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# THE INDIAN PARTNERSHIP ACT

(Act IX of 1932)

WITH SEVERAL APPENDICES CONTAINING THE PROCEDURAL LAW IN  
PARTNERSHIP SUITS, THE ENGLISH PARTNERSHIP ACT, REPEALED  
SECTIONS OF THE INDIAN CONTRACT ACT, REPORTS OF THE  
SPECIAL AND SELECT COMMITTEES, FORMS, A CHAPTER  
ON ACCOUNTING AND BOOK-KEEPING IN PARTNERSHIP  
CONCERNS, ETC.

BY

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AUTHOR OF THE LAW OF PRIVATE DEFENCE AND THE INDIAN CONTRACT ACT.

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BARRISTER-AT-LAW.



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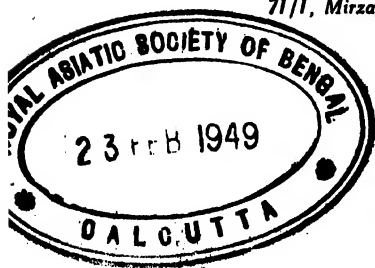
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## PREFACE.

In these pages I have attempted to elucidate the Indian Partnership Act with special reference to the principles underlying the rules formulated in its several sections. The law of partnership as contained in the Indian Contract Act was based on the rules of equity and common law of England which were subsequently crystallised in the first forty-four sections of the English Partnership Act. The framers of the Indian Partnership Act adopted the English Act as their model and made such occasional variations as the conditions of this country would require, and so the underlying principles are in both cases the same, and, likewise, all important details. Hence the value of the old decisions, both English and Indian, in so far as they throw light on the Act, is immense. I have, accordingly, incorporated in these pages illuminating and explanatory passages from those decisions and standard English authorities, especially from Lindley's classical work on the Law of Partnership, Halsbury's celebrated Laws of England and Pollock's useful Digest of the Law of Partnership, and further amplified them with reference to Indian decisions reported in all authorised and private journals, pointing out, at the same time, where those decisions should be taken to have been superseded by the new enactment. Those English authorities, to which I owe so much, are, however, indispensable for a fuller study of the Act, and it is expected that references given in these pages will facilitate it. I hope that this plan will commend itself to those who have to deal with the Act.

The several appendices contain, among other things, exhaustive annotations on the special procedural law in partnership suits and execution of decrees obtained therein. Several forms contained in Appendix VI have been drawn up in the light of the special provisions of the Act and are intended as a matter of suggestion only. The English Partnership Act and the repealed sections of the Indian Contract Act relating to partnership have been reprinted with a comparative table as an aid to comparative study.

I owe sincere gratitude to the erudite Judge, Mr. K. C. Chunder, I.C.S., who has been kind enough to revise the manuscript and help me with valuable suggestions and with his collection of English authorities which have been so valuable to me. My thanks are due to Babu Suprasanna Roy, M.A., B.L., who helped me in the preparation of the manuscript and to Babu Rabindra Nath Sanyal, B.A., for his assistance in seeing the book through the Press.



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# THE INDIAN PARTNERSHIP ACT

ACT No. IX OF 1932.

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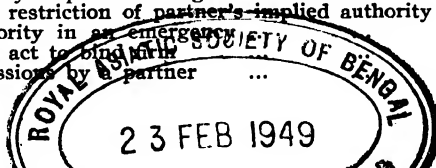
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# THE INDIAN PARTNERSHIP ACT.

## ACT NO. IX OF 1932.

*An Act to define and amend the law relating to partnership.*

WHEREAS it is expedient to define and amend the law relating to partnership; It is hereby enacted as follows :—

### CHAPTER I.

#### PRELIMINARY.

1. (1) This Act may be called the Indian  
Short title, extent and commencement. Partnership Act, 1932.

(2) It extends to the whole of British India, including British Baluchistan and the Sonthal Parganas.

(3) It shall come into force on the 1st day of October, 1932, except section 69, which shall come into force on the 1st day of October, 1933.

**Objects and Reasons** :—The present Act is the second of the series foreshadowed by the Special Committee on the Sale of Goods Bill in paragraph 8 of whose Report they said: "When Sir James Stephen moved the Indian Contract Bill, he admitted that it was not and could not pretend to be, a complete code upon the branch of law to which it related. He, however, expressed a hope that in later years it would be

easy to enact supplementary chapters relating to the several branches of the law of contract which the Bill did not touch. This hope has never been fulfilled. In later years it was found more convenient to have separate enactments for the several branches of the law of contract, *e.g.*, the Transfer of Property Act, the Negotiable Instruments Act, and the Merchant Shipping Act. In our opinion, in view of the complexity of modern conditions, the time has now come when this process should be accelerated by embodying the different branches of law relating to contract in separate self-contained enactments." Again in paragraph 6 they said: "Whatever merit the simple and elementary rules embodied in the Indian Contract Act may have had, and however sufficient and suitable they may have been for the needs which they were intended to meet in 1872, the passage of time has revealed defects the removal of which has become necessary in order to keep the law abreast of the developments of modern business relations."

**The Act is based on English Partnership Act :—**The present Act is based on the English Partnership Act, 1890 (53 and 54 Vict. c. 39). The law the English Partnership Act contains has been adopted in nearly all the British Dominions and Colonies and it also forms the basis of a uniform Partnership Act which is in force in the United States of America. It has received some approval from legal commentators, and is generally recognised as a useful code embodying most of the law applicable to modern partnerships. In the Introduction to the 9th edition of Lindley on Partnership it is said that the Act "has the merit of reducing a mass of law, previously undigested except by private authors, into a series of propositions authoritatively expressed."

**No substantial alteration :—**The Act does not alter in any substantial way the English law of partnership or the Indian law of partnership, which is based thereon. The main principles are the same, and likewise all important details. The deviations in principle it does show are on minor points, and have been introduced in order to adopt the law to Indian conditions or to supplement it in places where it is incomplete,

or are supported by the views of authoritative commentators. Further, the wording of clearly defined principles in the Partnership Act, 1890, has been freely adopted. Admittedly, any change in the wording of the English Act might have the disadvantage of making useful English decisions difficult to apply to Indian cases, but it is anticipated that the practical identity in substance of the two Acts and the similarity in wording of important provisions will avoid this undesirable result and will attract to difficult cases in India the benefits of English judicial experience.

**Difference between the Indian and the English Act :—**

The main source of difference between the Indian Partnership Act and the English Partnership Act lies in the greater emphasis given in the Indian Act to the personality of a firm. On this subject Lindley remarks on page 4 :—"One feature peculiar to the English law of partnership, and distinguishing it from the laws of other European countries and of Scotland, was the persistency with which the firm, as distinguished from the partners composing it, was ignored both at law and in equity. As no one can owe money to himself, it was held that no debt could exist between any member of a firm and the firm itself ; and although Courts of Equity, in winding up the concerns of a firm, treated the firm as the debtor or creditor of its members as the case might be, yet this was only for purposes of book-keeping, and in order to arrive at the net balance to be paid to or by each of the partners on the ultimate settlement of their accounts. This non-recognition of the firm was a defect in the law of partnership ; and it is to be regretted that the Partnership Act did not go further than it did in the direction of assimilating the English law to the Scotch. Had it done so, the difficulties of suing and being sued and of dealing with partners abroad, would have been greatly diminished". The Act goes some way to meet Lindley's criticism but it adheres strictly to the old established English and Indian view that a firm is not a legal person. The emphasis above referred to arises from two causes, the first of which is a mere matter of wording. The English Act defines the word

“partnership” as being “the relation which subsists between persons carrying on a business in common with a view to profit,” and, as regards a “firm” it says that “persons who have entered into partnership with one another are for the purposes of this Act called collectively a firm”. It appears that the framers of the English Act wished throughout to lay stress on the abstract relation of partnership and to avoid giving colour to the view that the firm has any degree of personality, for in the Act the term “partnership” is frequently used in the sense of “firm”, and also as an adjective in the sense of “belonging to a firm” or “relating to a firm”. The use of the defined word “firm” seems almost to be avoided. The Act confines the word “partnership” to its legitimate defined meaning of the relation which exists between partners, and wherever the partners themselves are referred to collectively it uses the word “firm”. Hence the word “firm” occurs very frequently in the Act, whereas the word “partnership” occurs rarely, and thereby the Act, as compared with the English Act, emphasises the concrete thing, the firm, as against the abstract relation, the partnership.

The second cause of the emphasis is very largely a matter of arrangement. The strict view of the existing law, placing full stress upon the abstract relation of partnership, is that “on any change amongst the persons comprising a partnership there is in fact a new partnership”.<sup>1</sup> This, however, is not the practical or commercial view of a firm, whereunder a firm has a sufficient degree of personality and of continuity to justify such common-places as advertisements which claim that a firm has been established for over a century. Even the English Law as expressed in the Partnership Act, 1890, has been forced to depart from the strict legal view of the firm, for it speaks of changes in a firm, or persons dealing with a firm after a change in its constitution, of debts due from the firm to a partner, and uses other phrases conceding some degree of personality to the firm, and of continuity in its existence in spite of internal changes. The Act goes in this

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<sup>1</sup> Lindley, p. 166.

direction to the limits which are already implied in the English Act ; and it collects together in a separate Chapter, entitled "Incoming and outgoing partners" all provisions which directly bear upon the introduction, retirement, expulsion, insolvency and death of partners in those cases where the business of the firm is carried on without a dissolution of partnership.

**Commencement** :—The whole of Chapter VII in so far as it provides machinery for registration, amendment of the register, grant of copies and so forth comes into force along with the rest of the Act so that firms may apply for registration at once. The section regarding the conclusive nature of the statements recorded in the register comes into force at the same time. But it would have been unjust to make all unregistered firms and partners incapable of suing until they have had a reasonable opportunity to register. Hence they have been allowed one year, by enacting that section 69 rendering them incapable of suing shall not come into force until one year after the commencement of the rest of the Act.<sup>2</sup>

**Interpretation of Statutes** :—The proper course in dealing with an Act intended to codify a particular branch of the law is in the first instance to examine the language of the Statute and to ask what is its natural meaning uninfluenced by any considerations derived from the previous state of the law and not to start with enquiring how the law previously stood, and then assuming that it was probably intended to leave it unaltered, to see if the words of the enactment will bear an interpretation in conformity with this view. If a Statute, intended to embody in a code a particular branch of the law, is to be treated in this fashion, its utility will be almost entirely destroyed, and the very object with which it was enacted will be frustrated.<sup>3</sup> But when it is contended that the legisla-

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<sup>2</sup> Report of the Special Committee.

<sup>3</sup> *Bank of England v. Vagliano*, (1891) A.C. 107; *Norendra v. Kamalbasini*, 23 Cal. 563, 571, 572; *Raghumull v. Official Assignee*, 28 C.W.N. 34 : 81 I.C. 17 : 1924 Cal. 424; *Rahimbux v. C. B. of India*, 56 Cal. 367 : 119 I.C. 23 : 1929 Cal. 497; *Satish Chandra v. Ram Dayal*, 48 Cal. 388 : 59 I.C. 143 : 1921 Cal. 1; *Alfred Wilkinson v. Grace Wilkinson*, 47 Bom. 843 : 77 I.C. 654 : 1923 Bom. 321 : 25 Bom. L.R. 945, F.B.; *Ganpat v.*



ture intended by any particular amendment to make substantial changes in the pre-existing law, it is impossible to arrive at a conclusion without considering what the law was previously to the particular enactment and to see whether the words used in the statute can be taken to effect the change that is suggested as intended.<sup>4</sup> The essence of a code is to be exhaustive on matters in respect of which it declares the law and it is not the province of a judge to disregard or go outside the letter of the enactment according to its true construction.<sup>5</sup> If the language is capable of two meanings, the Court may no doubt adopt the construction which seems to produce a beneficial result rather than a construction which produces an opposite result ; but if the words are clear, the Court can only give to them their natural meaning.<sup>6</sup> The Court should not adopt a construction which would lead to an absurdity or obvious injustice.<sup>7</sup> When the meaning is not clear in itself, the Court can examine the surrounding circumstances that led to or accompanied its enactment.<sup>8</sup>

**Headings and marginal notes :—**Headings have the force of words used in the preamble of the Act and may be used as a key to open the minds of the makers of the Act,<sup>9</sup> though

*Sopana*, 52 Bom. 88 : 107 I.C. 257 : 1928 Bom. 35 : 30 Bom. L.R. 1 ; *Hem Raj v. Krishan*, 10 Lah. 106 : 111 I.C. 8 : 1928 Lah. 361 : 29 P.L.R. 446, F.B.

<sup>4</sup> *Abdur Rahim v. Syed Abu*, 55 Cal. 519 ; 32 C.W.N. 482, 488 : 48 C.L.J. 55 : 55 I.A. 96 : 108 I.C. 361 : 1928 P.C. 16 : 9 P.L.T. 65 : 27 M.L.W. 339 : 30 Bom. L.R. 774 : 1928 M.W.N. 926, P.C.

<sup>5</sup> *Gokul v. Pudmanand*, 29 Cal. 707, 715, P.C.

<sup>6</sup> *Secy. of State v. Vacuum Oil Co.*, 1930 Bom. 597.

<sup>7</sup> *Khan Gul v. Lakhasingh*, 9 Lah. 701 : 111 I.C. 175 : 1928 Lah. 609 : 10 L.L.J. 413 : 30 P.L.R. 60 ; *K. R. Muthu v. David*, 50 Mad. 239 : 99 I.C. 284 : 1927 Mad. 166 : 51 M.L.J. 671 : 24 M.L.W. 730.

<sup>8</sup> *Hatimbhai v. Framroz*, 51 Bom. 516 : 104 I.C. 8 : 1927 Bom. 278 : 29 Bom. L.R. 498, F.B. ; *Secy. of State v. Raj Kumar*, 50 Cal. 347 : 82 I.C. 69 : 27 C.W.N. 472 : 1923 Cal. 585.

<sup>9</sup> *Debi Das v. Rupchand*, 49 All. 903 : 102 I.C. 792 : 1927 All. 593 : 25 A.L.J. 609 ; *Baldeo v. Kashi*, 92 I.C. 995 : 1926 All. 312 : 24 A.L.J. 337.

headings cannot militate against the clear language of sections.<sup>10</sup> But marginal notes are not parts of the Act,<sup>11</sup> and cannot be referred to for the purpose of construing the Act.<sup>12</sup> But they may be sometimes looked at if there be any doubt about the meaning of the words used.<sup>13</sup>

**Proceedings of the Legislature** :—Proceedings of the Legislature in passing a Statute are excluded from consideration on the judicial construction of Statutes.<sup>14</sup>

**2.** In this Act, unless there is anything repugnant in the subject or context,—

Definitions.

- (a) an “act of a firm” means any act or omission by all the partners, or by any partner or agent of the firm which gives rise to a right enforceable by or against the firm ;
- (b) “business” includes every trade, occupation and profession ;
- (c) “prescribed” means prescribed by rules made under this Act ;
- (d) “third party” used in relation to a firm or to a partner therein means any person who is not a partner in the firm ; and
- (e) expressions used but not defined in this Act and defined in the Indian Contract Act,

<sup>10</sup> *Kalyanji v. Ramdeen*, 48 Mad. 395 : 86 I.C. 449 : 1925 Mad. 609 ; 48 M.L.J. 290 : 26 Cr.L.J. 801 ; In re *Ananda Lal*, 1932 Cal. 246 : 35 C.W.N. 1103.

<sup>11</sup> *Sholapur Spg. and Wvg. Co. v. Pandharinath*, 113 I.C. 148 : 1928 Bom. 341 : 30 Bom. L.R. 893.

<sup>12</sup> *Balraj v. Jagatpal*, 26 All. 393, 406 : 8 C.W.N. 699, 706, P.C. ; *Natesa Mudaliar, In re*, 50 Mad. 733 : 99 I.C. 324 : 1927 Mad. 156 : 51 M.L.J. 704 ; *Padamsi v. Coll. of Thana*, 46 Bom. 366 : 64 I.C. 103 : 1922 Bom. 161 : 23 Bom. L.R. 799 ; *Syamo v. Emp.*, 1932 Mad. 391 : 1932 M.W.N. 305, F.B.

<sup>13</sup> *Gajendra v. Durga*, 47 All. 637 : 88 I.C. 768 : 1925 All. 503 : 23 A.L.J. 561, F.B., see also *Narayanaswami v. Rangaswami*, 49 Mad. 716 : 95 I.C. 731 : 1926 Mad. 749 : 24 M.L.W. 235.

<sup>14</sup> *Adm.-Genl. of Bengal v. Premlal*, 22 Cal. 788, 799, P.C.

collectively “a firm”, and the name under which their business is carried on is called the “firm name”.

**Old law** :—This section is an improvement upon section 239 of the Indian Contract Act. The important change lies the use of the words “acting for”, the intention being to bring out more clearly the fundamental principle that the partners when carrying on the business of the firm are agents as well as principals.

**Elements of partnership** :—The definition of ‘partnership’ contains three elements (1) there must be an agreement entered into by all the persons concerned ; (2) the agreement must be to share the profits of a business ; and (3) the business must be carried on by all or any of the persons concerned, acting for all. All these elements must be present before a group of associates can be held to be partners. These three elements may appear to overlap, but they are nevertheless distinct. The first element relates to the voluntary contractual nature of partnership ; the second gives the motive which leads to the formation of firms, *i.e.*, the acquisition of gain ; and the third shows that the persons of the group who conduct the business do so as agents for all the persons in the group, and are therefore liable to account to all.<sup>18</sup>

**Agreement between persons** :—Partnership is a relation which subsists between persons. Hence, strictly speaking, there cannot be a partnership when the relation subsists between persons and firms or firms and firms.<sup>19</sup> But a firm is nothing but an association of individuals, and when such an association under a firm name enters into partnership with another individual or another association of individuals, it is not the aggregate that combines with the individual but the individuals composing that aggregate. Hence a partnership between a firm and an individual is in law a partnership between the individuals which compose the firm and the individual and therefore not illegal.<sup>20</sup>

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<sup>18</sup> Notes on Clauses.

<sup>19</sup> *Mt. Basanti v. Babulal*, 124 I.C. 19 : 1931 All. 225 : 1931 A.L.J. 102.

<sup>20</sup> *Kader Bux v. Bukt Behari*, 36 C.W.N. 489.

**Agreement to share profits** :—A partnership 'is a contract of some kind undoubtedly—a contract, like all contracts, involving the mutual consent of the parties.'<sup>21</sup> To constitute a partnership, the parties must have agreed to carry on business and to share profits in some way in common.<sup>22</sup> There must be a business of some kind. Hence a mere agreement between several persons to share the income of a certain property does not constitute a partnership when there is no business carried on by all or any of them acting for all.<sup>23</sup> Further, the business must be carried on with a view to sharing its profits. Hence a society for religious or charitable purposes is not a partnership.<sup>24</sup> Though an agreement to share profits is essential to the constitution of partnership, it is not necessary that the profits should be shared at any particular time. Partners can leave their profits in the business. The real test is whether each could withdraw his share, if desired.<sup>25</sup>

It may be noted that though the money that one of the partners was to get is described as 'commission' in the agreement, it may be a share of the profits. In a memorandum of co-partnership agreement between several persons where it was provided that one of them should be in charge of the firm and would devote his whole time in the business and would get a certain amount per month over and above a certain per cent. as commission on the net profits of the firm but that he would get no share in the profits of the firm, he was held to be a partner of the firm.<sup>26</sup>

**Co-owners sharing gross returns\*** :—It is important

<sup>21</sup> *Per* Jessel, M.R. in *Pooley v. Driver*, 5 Ch. D. 458, 472.

<sup>22</sup> *Mollwo, March & Co. v. The Court of Wards*, 18 W.R. 384, P.C. ; (1872) L.R. 4 P.C. 419; *Ramanath v. Pitambar*, 43 Cal. 733.

<sup>23</sup> See *Bai Sakinaboo, In re*, 1932 Bom. 116 : 34 Bom. L.R. 100.

<sup>24</sup> Halsbury, Vol. 22, p. 4, para. 4.

<sup>25</sup> *Abdullah v. Allah Diya*, 8 Lah. 310 : 100 I.C. 846 : 1927 Lah. 333 : 28 P.L.R. 161; *Commissioner of Income Tax v. Kikabhai*, 1930 Nag. 6 : 121 I.C. 38.

<sup>26</sup> *Raghumull v. The Official Assignee*, 28 C.W.N. 34 : 81 I.C. 17 : 1924 Cal. 424.

\* See also section 6, Expl. 1.

to note that there is no partnership between co-owners because they agree to share gross returns. 'Receipt of a share of gross returns, as distinguished from receipt of a share of profits, is not even *prima facie* evidence of partnership.'<sup>27</sup> Thus if two co-owners of a race horse agree that one of them should have the management of the horse and defray the expenses in the first instance but that the expenses and winnings should be equally divided between them, there is no partnership. Nor would there be a partnership if two tenants in common of a house agree that one of them should have the general management and provide funds for repairs and divide the rents equally between them.<sup>28</sup> Similarly an agreement to share gross returns does not make a proprietor of a theatre who pays the expenses a partner of his lessee who is in the management. 'The authorities clearly show that two people merely receiving payment out of the gross profits of a business does not make a partnership between them, even as against the world.'<sup>29</sup>

**Agreement to share losses not necessary:**—It is not essential to constitute a partnership that the partners should agree to share the losses.<sup>30</sup> The element of sharing losses may be regarded as consequential upon the sharing of profits, as a firm may be created in which losses are not contemplated or provided for by the sanguine partners.<sup>30a</sup> 'Every man who has the share of profits of a trade, ought also to bear his share of the loss.'<sup>31</sup> The Act, therefore, does not seek to make agreement to share losses a test of the existence of partnership, but takes the course of treating the sharing of

<sup>27</sup> Halsbury, Vol. 22, p. 7, para. 10.

<sup>28</sup> *French v. Styring*, 2 C.B.N.S. 357 and 366.

<sup>29</sup> *Per Crompton, J., Lyon v. Knowles*, 3 B. & S. 556, 564.

<sup>30</sup> *Raghunandan v. Hormasjee*, 51 Bom. 342; 1927 Bom. 187: 100 I.C. 1025: 29 Bom. L.R. 207; *Mirza Mal v. Rameshar*, 51 All. 827: 118 I.C. 145: 27 A.L.J. 641: 1929 All. 536.

<sup>30a</sup> Notes on clauses.

<sup>31</sup> *Per De Gray, C.J. in Grace v. Smith*, 2 Wm. Blacks. 998; *Waugh v. Carver*, 2 H. Blacks. 235.

losses as a legal consequence arising out of the relation of partnership, which is established otherwise.<sup>32</sup>

Further, persons who agree to share the profits of an adventure in which they engage are *prima facie* partners, although they stipulate that they will not be liable for losses beyond the sums they engage to subscribe.<sup>33</sup> It is perfectly open to partner A to say that as between himself and his partner B, the partner A shall bear all the losses of the business.<sup>34</sup> But if an indemnity covers the amount subscribed, the transaction becomes a loan.

**Acting for all—principle of agency :—**The definition of “partnership” in the Indian Contract Act, sec. 239 was based upon Kent’s definition. The form adopted in the Act is that of Pollock, with one small change only. Pollock’s definition speaks of the business as being “carried on by all or any of them on behalf of all.” The difference lies in the use of the phrase “acting for” instead of “on behalf of.” The intention is to bring out more clearly the fundamental principle that the partners when carrying on the business of the firm are agents, as well as principals. Further, the use of the words “on behalf of” seems to give some justification to the wrong view that a person who merely shares the profits of the business is a partner inasmuch as such a person derives benefit from the business it may be said to be carried on his behalf.<sup>35</sup> Hence the important fact in determining whether a partnership exists is to see whether the relation of principal and agent exists between the parties and not merely whether the parties share in the profits and the business is carried on for the benefit of all. Persons who share the profits of a business do not incur the liabilities of partners unless that business is carried on by themselves personally or by others as their real or ostensible agents.<sup>36</sup> Thus in *Bullen v. Sharp*,<sup>37</sup> an assign-

<sup>32</sup> Notes on Clauses.

<sup>33</sup> *Brown v. Tapscott*, 6 M. & W. 119; Lindley, p. 51.

<sup>34</sup> *Raghunandan v. Hormasji*, 51 Bom. 342 : 1927 Bom. 187 : 100 I.C. 1025 : 29 Bom. L.R. 207.

<sup>35</sup> Notes on Clauses.

<sup>36</sup> *Cox v. Hickman*, 8 H.L.C. 268.

<sup>37</sup> L.R. 1 C.P. 86.

ment of the profits of a business upon trust to another to take a certain amount out of the profits and pay the residue to the assignor with a power to the assignee to act for the assignor in the business did not make the assignee a partner because it was the assignor's business and he had no authority to bind the assignee. Similarly, no relationship of partnership arose where a debtor assigned his property to trustees for the benefit of his creditors and carried on his trade under their control, because there was no relationship of principal and agent between them and the debtor was the master and the trustees were only inspectors and controllers.<sup>38</sup>

**Joint capital or stock not necessary:**—As a rule, each partner contributes either property, skill, or labour but this is not essential.<sup>39</sup> Thus, there need not be any joint capital or stock. 'If several persons labour together for the sake of gain, and of dividing that gain, they will not be partners the less on account of their labouring with their own tools'.<sup>40</sup> Where three persons were to get a share of the profits for their contribution to the capital required for the business while the fourth was to get a share of the profits for his labour, the fourth was also a partner.<sup>41</sup> On the other hand, 'a person who contributes property without labour, and has the rights of a partner, is usually termed a sleeping or dormant partner. A sleeping partner may, however, contribute nothing'.<sup>42</sup> Further, persons may be partners either generally or in some particular business or isolated transaction, though all or part of the property used for the purpose of such business transaction may not be the subject of joint ownership but may belong to some or one of them individually.<sup>43</sup> Thus, where two persons carried on the business of running a stage coach, or a stage waggon, each

<sup>38</sup> *Redpath v. Wigg*, L.R. 1 Ex. 335; *Easterbrook v. Barker*, L.R. 6 C.P. 1.

<sup>39</sup> Halsbury, Vol. 22, p. 4, para. 2.

<sup>40</sup> Lindley, p. 54.

<sup>41</sup> *Ghure Ram v. Mahomed Yusuf*, 1928 All. 549; 111 I.C. 686.

<sup>42</sup> Halsbury, Vol. 22, p. 4, para. 2; *Pooley v. Driver*, (1876) 5 Ch. D. 458, 472, 473.

<sup>43</sup> Halsbury, Vol. 22, p. 7, para. 9.

supplying his own horses for part of the journey and dividing the profits according to the mileage worked by their teams, they were held to be partners.<sup>44</sup> So if two or more persons agree that each shall buy or provide his own goods and export them for sale as a joint adventure, dividing the profits of the transaction in specified shares, there is no partnership as regards the separate parcel of goods provided by each, until they are brought into the common stock.<sup>45</sup> But where they agree to embark in a joint adventure for the purchase and sale of goods, there is a partnership as regards all the goods bought in pursuance of the agreement, and each is liable for the price of the goods bought by the others.<sup>46</sup>

**Management:**—The right to control the property, the right to receive profits, and the liability to share in losses are the elements of partnership. These are merely *indicia* that help the Court in finding whether a partnership exists.<sup>47</sup> But it is open to two partners to allow the business of the partnership to be conducted by one of the partners. So the fact that the control of the business is kept with one partner and that he has certain extra rights as a major partner does not in any sense negative the partnership according to law.<sup>48</sup>

**Sub-partnership:**—As a general rule, no person can be introduced as a partner into a firm without the consent of all the existing partners (see sec. 31), and an assignment of a partner's interest does not confer upon the assignee the rights of a partner as against the original firm but he has certain well-defined though limited rights (see sec. 20). If, however, a partner agree with an outsider to share the profits of the partnership,

<sup>44</sup> *Fromont v. Coupland*, (1824) 2 Bing. 170; *Russel v. Austwick*, (1826) 1 Sim. 52. Halsbury, Vol. 22, p. 7, f.n. (i)

<sup>45</sup> *Saville v. Robertson*, (1792) 4 Term Rep. 720, 725; *Heap v. Dobson*, (1863) 15 C.B.N.S. 460. Halsbury, Vol. 22, p. 6, para. 8.

<sup>46</sup> *Gouthwaite v. Duckworth*, (1810) 12 East. 421; *Lowe v. Dixon*, (1885) 16 Q.B.D. 455; Halsbury, Vol. 22, p. 7, para. 8.

<sup>47</sup> *Ex parte Delhasse*; *In re Megevand*, 7 Ch. D. 511, 526; ref. to in *Vadilal v. Shah Khushal*, 27 Bom. 157, 161.

<sup>48</sup> *Ambalal Sarabhai*, *In re*, 1924 Bom. 182; 77 I.C. 669; 25 Bom. L.R. 1225.



the outsider does not become a partner nor acquires any right in the partnership, but the agreement makes the parties to it partners *inter se* and a sub-partnership is constituted between them. Again, where a person pays a part of a partner's contribution in a venture, he becomes a sub-co-adventurer with him but not a partner in the venture, and so becomes responsible to that person to the extent of his contribution.<sup>49</sup>

**Firms, Corporations and Companies:**—A firm is not a legal entity,<sup>50</sup> nor is it a person.<sup>51</sup> It is merely a collective name for the individuals who are members of the partnership, which is a relation subsisting between persons.<sup>52</sup> Hence a firm as such cannot be a member of a partnership,<sup>53</sup> though when an association of individuals under a firm name enters into partnership with another individual, it may be said that it is not the aggregate that combines with the individual but the individuals composing that aggregate.<sup>54</sup> Throughout the Act the word "partnership" is used in the defined sense of a relationship, and in no other, and where the partners are referred to collectively the word "firm" is invariably used. Hence it is necessary to note the distinction between partnerships, corporations and companies.

<sup>49</sup> *Bianco v. Demarco*, 1932 P.C. 63.

<sup>50</sup> *Sadler v. Whiteman*, (1910) 1 K.B. 868, 889 C.A.; *R. v. Holden*, (1912) 1 K.B. 483, 487, C.C.A.; *Seodoyal v. Joharmull*, 50 Cal. 549; 1924 Cal. 74 : 75 I.C. 81; *Borjo Lal v. Budh Nath*, 55 Cal. 551 : 1928 Cal. 148 : 105 I.C. 549; *Firm of Gokaldas v. Firm of Vassumal*, 1925 Sind 298 : 87 I.C. 992; *Rampratab v. Gaurishankar*, 1924 Bom. 109 : 85 I.C. 464 : 25 Bom. L.R. 7; *Vyankatesh Oil Mill Co. v. Velmahomed*, 1928 Bom. 191 : 109 I.C. 99 : 30 Bom. L.R. 117.

<sup>51</sup> *Seodoyal v. Joharmull*, 50 Cal. 549 : 1924 Cal. 74 : 75 I.C. 81; *Brojo Lal v. Budh Nath*, 55 Cal. 551 : 1928 Cal. 148 : 105 I.C. 549; *Rampratab v. Gaurishankar*, 1924 Bom. 109 : 85 I.C. 464 : 25 Bom. L.R. 7; *Re Sawers, Ex parte Blain*, (1879) 12 Ch. D. 522, C.A.; *Re Vagliano Anthracite Collieries Ltd.*, (1910) 79 L.J. (CH.) 769; but in Scotland a firm is a legal person distinct from the partners composing it (Halsbury, Vol. 22, p. 5, f.n. (g)) like a limited company.

<sup>52</sup> Sec. 4; *Seodoyal v. Joharmull*, 50 Cal. 549; 1924 Cal. 74 : 75 I.C. 81.

<sup>53</sup> *Seodoyal v. Joharmull*, 50 Cal. 549 : 1924 Cal. 74 : 75 I.C. 81.

<sup>54</sup> *Kader Bux v. Bukt Behari*, 36 C.W.N. 489.

"A corporation is a fictitious person created by special authority (by the law of England, by the Crown, or by parliament), and endowed by that authority with a capacity to acquire rights and incur obligations, as a means to the end for the attainment of which the corporation is created. A corporation, it is true, consists of a number of individuals, but the rights and obligations of these individuals are not the rights and obligations of the fictitious person composed of those individuals; nor are the rights and obligations of the body corporate exercisable by or enforceable against the individual members thereof, either jointly or separately, but only collectively, as one fictitious whole. \* \* With partnerships the case is otherwise; the members of these do not form a collective whole, distinct from the individuals composing it; nor are they collectively endowed with any capacity of acquiring rights or incurring obligations. The rights and liabilities of a partnership are the rights and liabilities of the partners and are enforceable by and against them individually."<sup>55</sup>

It has been noticed that a firm is not a legal entity and is not a *persona* but a corporation is a legal person just as much as an individual.<sup>56</sup> From the date of incorporation the company becomes a body corporate, (sec. 23, Indian Companies Act) and is considered to be a distinct person from its members. Further, there is no relationship of principal and agent between the company and its members, and they are not, therefore, like partners, bound by those rules of conduct which are based upon that relationship, *e.g.*, rules regarding the carrying on of a competing business or contracts by members involving personal gain. Almost all the differences between a partnership and a company may be traceable to these distinctions. Thus a company owns its property just as much as an individual owns his own, in contradistinction to its individual members to whom the property does not belong, but the partnership property belongs to its individual members. There is no personal liability of the members of a company beyond the extent of the payment of

<sup>55</sup> Lindley, pp. 22, 23.

<sup>56</sup> Ram Kanai v. Mathewson, 45 I.A. 1029, 2 C.



calls to the extent of the value of their shares, but in a partnership each partner is personally liable for all partnership debts. All the members of a company have no authority to bind the company by their acts which authority is confined to the directors and other persons authorised by the company's regulations, but in a partnership every partner is unlimited agent of every others and can bind them by his acts within the scope of the partnership. Every person dealing with a company is bound to acquaint himself with its regulations but secret limitations of a partner's authority are of no avail to a stranger who acts without knowing them. Unlike partnership, a company is not dissolved by the death or bankruptcy of any of its members and unlike a company which consists of a fluctuating number of members, no person can be introduced as a partner into a firm against the consent of other partners nor does an assignee of a partner acquire the rights of his assignor as against the original firm.

**Registration** :—A company and a partnership are each an association of persons with the object of trading for gain, but by reason of section 4 of the Indian Companies Act, (1) "No company, association or partnership consisting of more than ten persons shall be formed for the purpose of carrying on business of banking unless it is registered as a company under this Act, or is formed in pursuance of an Act of Parliament or some other Act of the Governor-General in Council, or of Royal Charter or Letters Patent," and (2) "No company, association or partnership consisting of more than twenty persons shall be formed for the purpose of carrying on any other business that has for its object the acquisition of gain by the company, association or partnership, or by the individual members thereof, unless it is registered as a company under this Act, or is formed in pursuance of an Act of Parliament or some other Act of the Governor-General in Council or of Royal Charter or Letters Patent."

Provision has been made for registration of firms in Chapter VII of this Act but failure to register does not affect the legality of the partnership. The members of a Hindu

joint family carrying on a family business require no registration under this Act (see under sec. 5).

**Instances of partnership :—**A partnership is created by advancing money to others for carrying on business, the latter binding themselves to account to the former for a share of the profits ;<sup>57</sup> or by purchase of goods or raising of money for joint adventure, the dealing though ostensibly by an individual is truly and substantially a dealing of the joint adventure ;<sup>58</sup> or by an agreement by several creditors to sue their debtor for their individual debts and share the costs and profits of all suits ;<sup>59</sup> or by an agreement to carry on a money-lending business by certain persons with no other object except to divide the interest arising from the transaction ;<sup>60</sup> or by an agreement that certain person is to get a fixed pay and a certain percentage on the net profits of the business as commission, because the commission was a share of the profits of the business.<sup>61</sup>

**Promoters of a company :—**Persons who are working together to form a company, although they may intend to become members of a company after its formation, are not partners if this be the only relation between them. Though their object is ultimately to acquire profit, their immediate object is the formation of a company. Promoters may become partners in fact by actually carrying on, as incidental to the work of forming a corporation, a business enterprise.<sup>62</sup>

**Illegal Partnerships :—**An agreement which contravenes the policy of the law as contained in an Act of the legislature or which has for its object the carrying on of a business in

<sup>57</sup> *Shaikh Peer Mahomed v. Nekjan Bibi*, 25 W.R. 49; distinguish sec. 6, Expl. 2 (a).

<sup>58</sup> *Karmali Abdulla v. Vora Karimji*, 39 Bom. 261 : 19 C.W.N. 337, P.C.

<sup>59</sup> *Bhagtidas Bhagvandas v. N. R. Olver*, 9 B.H.C.R. 418.

<sup>60</sup> *Mulchand v. Tarachand*, 1929 Nag. 137 : 116 I.C. 646; *Hyder Ali v. Elahee Bux*, 8 Cal. 1011 dist., the parties are partners and not co-owners.

<sup>61</sup> *Raghumull v. The Official Assignee of Calcutta*, 28 C.W.N. 34.  
<sup>81</sup> I.C. 17 : 1924 Cal. 424.

<sup>62</sup> *William Rowe v. Lews Pugh*, 1924 Cal. 940.

contravention thereto is illegal.<sup>63</sup> So an agreement of partnership may be illegal by reason of section 23 of the Contract Act or of any other Act of the legislature or condition of a license granted under the provisions of an Act. Thus a contract of partnership contrary to the terms of an *abkari* license is illegal,<sup>64</sup> and if a person being aware of the prohibition advances capital for the partnership, he cannot recover the amount.<sup>65</sup> A contract of partnership to trade in feathers of herons which trade is prohibited by a Government notification is illegal and void being against public policy.<sup>66</sup> Similarly, a contract of partnership with an overseer in Public Works Department who is prohibited by the rules of his office from entering into any trade or contract with that department is fraud upon the public and is a nullity.<sup>67</sup>

But it is important to note that a partnership is *prima facie* legal unless it is proved that the object of the same was illegal or that the object of the partnership necessarily involved something illegal or contrary to public policy, and so while it is the duty of the Court not to render its aid to the enforcement of transactions which are illegal, it is at the same time incumbent that the illegality should be sufficiently proved and that the facts constituting illegality established.<sup>68</sup> A partnership with a licensee is not necessarily in all cases and under all circumstances illegal,<sup>69</sup> and there may be a partnership to start a business for

<sup>63</sup> *Jadoo Nath v. Nabin Chunder*, 21 W.R. 289, foll. in *Behari Lal v. Jagdish*, 31 Cal. 798.

<sup>64</sup> *Garapathi v. Kurella*, 43 Mad. 141; 38 M.L.J. 123; *Marudamuthu v. Rangasami*, 24 Mad. 401; *Padmanabham v. Badrinath*, 35 Mad. 582; *Dewandas v. Kesomal*, 1925 Sind 55; 87 I.C. 353; 18 S.L.R. 16; *Mahomed Ghonsa v. Thimma*, 1 Mys. L.J. 90.

<sup>65</sup> *Gopalrav v. Kalappa*, 3 Bom. L.R. 164; *Hormasji v. Pestonji*, 12 Bom. 422.

<sup>66</sup> *Fazal Muhammad v. Ata Muhammad*, 11 Lah. 8; 1929 Lah. 663.

<sup>67</sup> *Sharoda Pershad v. Bhola Nath*, 11 W.R. 441; see also *Sahib Ram v. Nagarmal*, 63 P.R. 1884, a partnership with an employee of the commissariat department to supply wheat to the department.

<sup>68</sup> *Vazhmuni v. Nathmuni*, 1930 Mad. 361; 122 I.C. 342.

<sup>69</sup> *Gangadara v. Swaminadha*, 1926 Mad. 218; 92 I.C. 112; 22 M.L.W.

the sale of drugs and to obtain lease from the Government in the name of one partner only.<sup>70</sup> It is not illegal for several persons to enter into a partnership for the purpose of bidding at a toddy shop auction, and if successful, of obtaining a license and of carrying on a toddy shop business.<sup>71</sup> So every contract of partnership is not necessarily a transfer,<sup>72</sup> and a partnership formed prior to taking *abkari* license in one partner's name and prior to possessing stock does not involve a transfer.<sup>73</sup> An agreement to share in the profits and losses in a grass contract with the forest department though contravening the terms of the license, is not void,<sup>74</sup> and a partnership to carry out the terms of a contract obtained from the Government under the Forest Act in one's own name is not illegal nor opposed to public policy.<sup>75</sup>

The principle seems to be this. As a general rule, the law does not forbid things in express terms, but imposes penalties for doing them, and the imposition of such penalties implies prohibition, an agreement to do a thing so prohibited is un-

<sup>70</sup> *Mt. Merha v. Kundan Lal*, 25 I.C. 146 (Oudh).

<sup>71</sup> *Narayanamurthy v. Subrahmanyam*, 114 I.C. 655 : 1928 Mad. 1197.

<sup>72</sup> *Padmanabham v. Badrinath*, 35 Mad. 582 : 21 M.L.J. 425 : 10 I.C. 126 : (1911) 1 M.W.N. 371.

<sup>73</sup> *Ibid.*; *Vazhmuni v. Nathmuni*, 1930 Mad. 361 : 122 I.C. 342. See also *Jnanendra v. Chandl*, 29 I.C. 480 (Cal.), a partnership for the sale of excisable articles is not necessarily illegal. *Bisheshar v. Govind*, 114 P.R. 1906, the mere admission of another person to share in the profits of the business cannot be considered as a transfer within the rules. *Bhakto v. Bainchra*, 11 C.P.L.R. 62, the mere admission by an excise licensee of an unlicensed person to partnership would not necessarily be unlawful. So prohibition regarding "selling, transferring or subletting" (*Gauri Shankar v. Mumtaz*, 2 All. 411, 413, F.B., a case of Government ferry and condition against subletting or transferring; *Radhey Shyam v. Mevalal*, 51 All. 506 : 116 I.C. 89 : 1929 All. 210 : 1929 A.L.J. 212; *Karsan v. Gathu*, 37 Bom. 320; *Champsey v. Gordhandas*, 19 Bom. L.R. 381; *Gordhandas v. Champsey*, 1921 P.C. 137) or otherwise alienating the privilege of the license, (*Champsey v. Gordhandas*, 19 Bom. L.R. 381; *Gordhandas v. Champsey*, 1921 P.C. 137) does not cover the case of admission of partners.

<sup>74</sup> *Nazarali v. Babamitya*, 40 Bom. 64.

<sup>75</sup> *Mukala Venkatanandan v. Immidisetty Dhanarajir*, 1929 Mad. 689.

lawful under sec. 23 of the Indian Contract Act. Where a statute prescribes no penalties an agreement in breach of a condition imposed under powers given by it does not fall under that section. So where a condition is imposed under statute purely for administrative purposes, an agreement in violation thereof is not void.<sup>75a</sup> But where the purpose of the law is not confined to the protection of the revenue merely but the prohibition is based upon the principles of public policy and moral grounds also, an agreement in contravention thereof is illegal.<sup>75b</sup>

**Partnership with alien enemies :—**There can be no partnership with alien enemies when war has once been declared. Commercial intercourse is prohibited, and immediately that prohibition comes into force it is impossible for the relationship of partners to subsist.<sup>76</sup>

**Accounts in illegal partnerships :—**Although the Court will not, as a rule, give its assistance to persons who carry on an illegal business, an account may be ordered against a defendant who asserts the illegality of the partnership.<sup>77</sup>

**Specific performance :—**Specific performance of an agreement to enter into partnership is not, as a general rule, granted against an unwilling person as the decree would be nugatory,<sup>77a</sup> though when such an agreement has been acted upon the execution of a formal agreement recording its terms may be decreed for the purpose of conferring rights which arise out of it.<sup>77b</sup>

<sup>75a</sup> *Bhikombhal v. Hiralal*, 24 Bom. 622.

<sup>75b</sup> *Boistub Churn v. Wooma Churs*, 16 Cal. 436, foll. in *Behari Lal v. Jagodish*, 31 Cal. 798, a case of transfer of a liquor shop without renewing the license in the name of the transferee—illegal; *Marudamuthu v. Rangasami*, 24 Mad. 401.

<sup>76</sup> *R. v. Kupfer*, (1915) 2 K.B. 321, C.C.A. at p. 338; *Stevenson & Sons Ltd. v. Aktiengesellschaft fur Cartonnagen-Industrie*, (1918) A.C. 239, H.L.

<sup>77</sup> *Sheppard v. Oxenford*, (1855) 1 K. & J. 491. Halsbury, Vol. 22, p. 71, para 139.

<sup>77a</sup> *Scott v. Rayment*, 7 Eq. 112.

<sup>77b</sup> *Buxton v. Lister*, 3 Atk. 385; *England v. Curling*, (1884) 8 Beav. 127

**5.** The relation of partnership arises from contract and not from status;  
 Partnership not created by status.

and, in particular, the members of a Hindu undivided family carrying on a family business as such, or a Burmese Buddhist husband and wife carrying on business as such are not partners in such business.

**Partnership results from contract :—**This section emphasises one of the elements in the definition, namely, that partnership is the result of voluntary agreement. In view of the vast extent of non-contractual quasi-partnership relations in India, of which the Hindu trading family is the outstanding example, this section has been enacted to prevent all possible doubt.<sup>78</sup>

**Heirs of a partner or sole proprietor :—**The term 'partnership' does not extend to the relation between the firm and the persons composing the family of a member and succeeding to his rights.<sup>79</sup> When the sole proprietor of a firm dies, his heirs certainly inherit the stock-in-trade, the outstanding dues and even the goodwill, but such heirs do not *ipso facto* become partners of the firm. When there was a sole proprietor there is no question of a partnership which must be between more than one person. On the death of the sole proprietor, his heirs do not automatically become partners of the old firm but merely heirs to the assets of the deceased. Before a partnership can come into existence there must be an express or implied agreement between the heirs that the old firm should be continued. This agreement might be inferred from the fact that the firm was allowed to carry on business even after the death of the sole proprietor. But in the absence of any such evidence it would not be just to presume that the heirs of the deceased proprietor become partners of the new

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<sup>78</sup> Notes on Clauses.

<sup>79</sup> *Mt. Basanti Bibi v. Babu Lal*, 124 I.C. 19 : 1931 All. 225 : 1931 A.L.J.



firm.<sup>80</sup> On similar principles, though a Hindu infant becomes entitled to an interest in the joint family business by birth or inheritance, he can only become a member of the trading partnership which carries on the business by a consentient act of himself and his partners.<sup>81</sup>

**Coparcener becoming a partner does not represent others :—**As an agreement, express or implied, is essential for the creation of partnership, there can be no presumption in law that a member of a joint Hindu family entering into a partnership with certain persons who are strangers to the family is doing in a representative or vicarious capacity so as to hold that the other members of the family become *ipso facto* liable as partners in that partnership. If the liability is sought to be fastened upon the other members of the family it can only be done either by evidence of consensus or by evidence to prove an agency through which the contract of partnership was brought into existence.<sup>82</sup> Although a person carrying on business is a coparcener in a joint family, it does not, therefore, necessarily follow that all his coparceners are partners in that business, entitled with him to its rights and responsible with him for its liabilities. The fact of partnership must be proved by evidence showing common agreement to form one.<sup>83</sup> Hence in the absence of an agreement the stranger partner is not bound to recognise any member of the family other than

<sup>80</sup> *Habib Bux v. Samuel Fitz & Co.*, 1926 All. 161 : 89 I.C. 22 : 23 A.L.J. 961 : 6 L.R.A. Civ. 553.

<sup>81</sup> *Lutchmanan v. Siva Prokasa*, 26 Cal. 349, 354; *Anant Ram v. Channu Lal*, 25 All. 378, 384; *Vadilal Lallubhai v. Shah Khushal*, 27 Bom. 157; see also *Lalji v. Keshowji*, 37 Bom. 340; *Official Assignee of Madras v. Palaniappa*, 41 Mad. 824.

<sup>82</sup> *Mirza Mal v. Rameshar*, 51 All. 827 : 118 I.C. 145 : 1929 All. 536 : 1929 A.L.J. 641; *Hemraj v. Topan*, 1925 Sind 300 : 86 I.C. 950. *Khasidhar v. Daya Kishan*, 43 All. 116 : 1921 All. 306; See also *Harnamdas v. Firm of Mayadas*, 1925 Sind 310 : 87 I.C. 905.

<sup>83</sup> *Vadilal v. Shah Khushal*, 27 Bom. 157; *Laxaman v. Bhickchand*, 1930 Bom. 1 : 122 I.C. 843 : 31 Bom. L.R. 1179; see also *Rajmal v. Isherdas*, 1927 Sind 247 : 107 I.C. 221.

his partner as having any interest in the firm.<sup>84</sup> Thus a contract of partnership entered into by the manager of a Hindu joint family with strangers does not *ipso facto* make the other members of the family partners ; and not being partners, the other members, whether divided or undivided, cannot institute any suit in respect of the partnership, *e.g.*, a suit for the dissolution of partnership.<sup>85</sup> But this does not militate against the principle that as between the managing member and the other members of the family the former has a duty to render accounts to the latter, and that profits derived from the investment of joint family capital in business is just as much joint family property as the capital from which such profits derived is.<sup>86</sup>

**Son no partner in father's business :—**The mere fact that the son being joint with his father does not *ipso facto* give the former any right in his father's business unless it be a joint family business. Nor does the son make himself liable as a partner by assisting his father in his difficulties in connection with the business. Further, the mere fact that a man carries on a business in the name of his son does not establish that the son is a partner in the business. The firm being named after the son may be due to the father regarding the son's name as propitious for the purpose of the business. The use of the name could not make the son a partner unless there was a consentient act on his part indicating that he was a member of the firm.<sup>87</sup>

### **Hindu Joint family business :—**

*Characteristics of the business :—*A Hindu joint family business is not a case of ordinary partnership, arising out of

<sup>84</sup> *Ramanathan v. Yegappa*, 30 M.L.J. 241; *Sokkanadha v. Sokkanadha*, 28 Mad. 334; see also *Gangayya v. Venkataramiah*, 45 Mad. 454 : 34 M.L.J. 271, 278.

<sup>85</sup> *Gangayya v. Venkataramiah*, 41 Mad. 454 : 34 M.L.J. 271; *Hemraj v. Topan*, 1925 Sind 300 : 86 I.C. 950; *Sheonarain v. Babulal*, 1925 Nag. 268 : 85 I.C. 775.

<sup>86</sup> *Ajodhya v. Mahadeo*, 14 C.W.N. 221 : 3 I.C. 9.

<sup>87</sup> *Tulsidar v. Lyon Lord & Co.*, 1925 Sind 225 : 86 I.C. 934 : 18 S.L.R. 117.

contract. It is a case of joint ownership in trading business, created through the operation of Hindu law between the members of an undivided Hindu family.<sup>88</sup> An ancestral trade descends, like other inheritable property, upon its members. The partnership so created, or surviving, has many, but not all, of the elements existing in an ordinary partnership.<sup>89</sup>

**Law applicable is Hindu Law :—**A Hindu undivided family carrying on a family business may have many of the characteristics of a firm, but it is not a firm. Partnership arises only from contract and is not created by status or obtained by birth. The law of partnership has no application to these families, whose internal relations and liabilities for the acts of members are governed entirely by the Hindu law. Even in the case where a trading family enters into partnership with outsiders no special provision for the registration of its members is needed. As partnership arises only from contract, only that member who makes the contract of partnership with outsiders can be considered to be a partner. He may or may not represent the whole family, and only his interest or the whole joint family property may be liable for the debts of the firm ; but these are questions of fact mainly, or, where they are mixed questions of fact and law, the law is not that of partnership but is the Hindu law. If the partner member does represent the family and if his share of the profits of the firm goes into the family stock, then the whole of the joint family property will be liable for the debts of the firm. But if the partner member is trading on his own responsibility and keeps the profits to himself then the creditors of the firm cannot realise their claims against the firm from the joint family property, beyond the extent of the interest of the partner member. It will be seen that the principles of law involved are principles of the Hindu law, and that they are the same principles which are applied to all dealings by the manager or representative of the joint family.<sup>90</sup> Thus the rights and

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<sup>88</sup> *Samalbhat v. Someshwar*, 5 Bom. 38, 40.

<sup>89</sup> *Ramlal v. Lakhmichand*, 1 Bom. H. C. Rep. 51.

<sup>90</sup> Report of the Special Committee.

liabilities of the members of a Hindu joint family owning a trade business must be considered with reference to the Hindu law.<sup>91</sup> But relations of strangers with joint Hindu families when they enter into transactions of partnership, are not governed strictly by the Hindu law but by the general law of partnership.<sup>92</sup>

**Death and dissolution :—**In ordinary partnership, subject to contract between the partners under section 42 (c) a firm is dissolved by the death of a partner. But in a Hindu joint family business, the death of one of the partners does not dissolve the partnership,<sup>93</sup> and a stipulation that the partnership will not be dissolved by the death of any partner is ordinarily to be inferred.<sup>94</sup> In Hindu law a business is a distinct heritable asset,<sup>95</sup> and where a Hindu dies leaving a business it descends like other heritable property to his heirs.<sup>96</sup>

But the principle of survivorship does not apply where the business is carried on by Hindus who are not members of a joint family. So where a Hindu proprietor gifted a share of his business to his nephews who allowed their share to remain in the business, it was held that there was no Hindu law partnership because the uncle and nephews were not members of a joint family so that the partnership dissolved on the death of a partner.<sup>97</sup> Similarly the partnership of the manager of

<sup>91</sup> See *Raghumull v. Luchmondas*, 20 C.W.N. 708, 721; *Samalbhai v. Someshwar*, 5 Bom. 38, 40; *Anant Ram v. Channu Lal*, 25 All. 378.

<sup>92</sup> See *Bankey Lal v. Nattha Ram*, 1929 All. 199 : 107 I.C. 567; *Anant Ram v. Channu Lal*, 25 All. 378, 384; *Sudarsanam v. Narasimhulu*, 25 Mad. 149.

<sup>93</sup> *Samalbhai v. Someshwar*, 5 Bom. 38, 40; *Haroon Mahomed*, in the matter of, 14 Bom. 189, 194; *Ganpat v. Annaji*, 23 Bom. 144; see also *Raghumull v. Luchmondas*, 20 C.W.N. 709, 721 and the cases referred to therein.

<sup>94</sup> *Faqir Chand v. Nanug Ram*, 1924 All. 277 : 74 I.C. 721.

<sup>95</sup> *Sakrabhai v. Maganlal*, 26 Bom. 206, 215.

<sup>96</sup> *Joti Pershad v. Hiralal*, 1929 Lah. 559 : 117 I.C. 911 : 11 L.L.J. 233; *Samalbhai v. Someshwar*, 5 Bom. 38; *Lutchmanen v. Siva Prokasa*, 26 Cal. 349, 354.

<sup>97</sup> *Nishal v. Kishori*, 97 P.R. 1910.

a joint Hindu family and a stranger dissolves on the death of the manager.<sup>98</sup>

**Authority to bind the members and their personal liability** :—In ordinary partnerships, the relations of partners to third parties are described in Chapter IV, and a partner has authority to bind the firm. Under section 25 a partner is jointly and severally liable for all acts of the firm. A partner is the agent of the firm for the purposes of the affairs of the firm, but the manager of a joint Hindu family is not an agent in the strict sense of the term.<sup>99</sup> The position of the manager and other coparceners is peculiar in Hindu law. The manager of an undivided Hindu family can by a contract to pay money bind his adult coparceners,<sup>1</sup> and the members of a joint Hindu family owning a family business carried on by the managing member must be presumed to have consented to be liable for loans contracted by the latter for the business.<sup>2</sup> A coparcener who is not the manager may also bind the other coparceners under certain circumstances "as accredited agents in the management of the family business".<sup>3</sup> But though the family estate is liable for the debts contracted by the managing member and the separate property of the manager is also liable for the same, the separate property of the other members is not liable.<sup>4</sup> That is, the liability of those members of the family not actively engaged in the conduct of the business

<sup>98</sup> *Seth Rambhan v. Prayagdas*, 1924 Nag. 263 : 78 I.C. 198 : 20 N.L.R. 49 : 7 N.L.J. 195.

<sup>99</sup> *Kandasami v. Somaskanta*, 35 Mad. 117 : 20 M.L.J. 371 : 5 I.C. 922 : 7 M.L.T. 165.

<sup>1</sup> *Krishna Ayyar & Co. v. Krishnasami*, 23 Mad. 597, 600; *Sakrabhai v. Maganlal*, 26 Bom. 206, 215.

<sup>2</sup> *Bemola v. Mohan*, 5 Cal. 792, case of mortgage by the managing member.

<sup>3</sup> *Krishna Ayyar & Co. v. Krishnasami*, 23 Mad. 597, 600; *Sheo Pershad v. Saheb Lal*, 20 Cal. 453, 461. See however, *Lal Chand v. Ghanaya*, 1930 Lah. 243 which followed 23 Mad. 597, but it was held that the debt binds the other coparceners *personally*. The rule laid down in 22 Mad. 166 (see below) was not considered.

<sup>4</sup> *Chalamayya v. Varadayya*, 22 Mad. 166.

would be restricted to the share of each member in the joint family property.<sup>5</sup>

A minor inheriting an ancestral trade will be bound by all acts of the guardian necessarily incidental to or flowing out of the carrying on of the trade.<sup>6</sup> Where a minor is a coparcener in a joint family, his share in the joint family is liable for the debts contracted by the managing coparcener for any family purpose or any purpose incidental to it.<sup>7</sup> But where a member of a joint family carrying on an ancestral family business upon attaining majority separates entirely from the family and the family business and thereafter acquires separate property, such separate property cannot be made liable for the debts incurred by the family trading firm but the interest of the separating member in the family property will alone be liable.<sup>8</sup> To make him personally liable it should be shown that he ratified the transactions entered into by the family partnership.<sup>9</sup>

The rule that debts contracted by a managing member are binding on all other members only when they are for a family purpose is subject to the exception that when the family maintains itself by means of a business or a profession, the managing member has an implied authority to contract debts for its purposes. But he has no implied authority to pledge family property for a new business.<sup>10</sup>

*Property acquired by the family trade*:—Joint family property acquired by the profits of a family trade is subject to all the liabilities of that trade.<sup>11</sup>

**Liability to account**:—In ordinary partnerships, section 46 defines the right of partners to have the business wound up after dissolution and section 48 describes the mode of

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<sup>5</sup> *Jaharmal v. Chetra*, 39 Bom. 715.

<sup>6</sup> *Ram Pratab v. Foolibai*, 20 Bom. 767.

<sup>7</sup> *McLaren Morrison v. Vershoyle*, 6 C.W.N. 249.

<sup>8</sup> *Bishambhar v. Fateh Lal*, 29 All. 176; *Bishambhar v. Sheo Narain*, 29 All. 166.

<sup>9</sup> *Bishambhar v. Sheo Narain*, 29 All. 166.

<sup>10</sup> *Raghunathji v. Bank of Bombay*, 34 Bom. 72.

<sup>11</sup> *Johurra Bibee v. Sreegopal*, 1 Cal. 470; *Ramlal v. Lakmichand*, 1 Bom. H.C.R. App. 51, 71.

settlement of accounts. But the liability of the manager of a joint Hindu family to render accounts to the other members is distinct from the liability of a trustee to the *cestui que trust* or from that of a member of a partnership to the other members. It stands upon the fiduciary relationship among the members which is liable to terminate any time at the will of any of the coparceners and is quite independent of any contract, tacit or express. The principle upon which the right to call for an account rests is not the existence of a direct agency or of a partnership, it depends upon the right which the members of a joint Hindu family have to a share of the property ; and where there is a joint interest in the property, and one party receives all the profits, he is bound to account to the other parties who have an interest in it for the profits of their respective shares, after making such deductions as he may have a right to make.<sup>12</sup> But it should be noted that the relationship which exists between a *karta* and the members of a joint family is only one of fiduciary character and the rules applicable to strict accounts between trustees and *cestuis que trusts* that exist in England do not apply in their entirety. This does not mean that breach of established duty should be less severely dealt with in India than in England. In the absence of proof of direct misappropriation or fraudulent and improper conversion of the moneys to the personal use of the manager, he is liable to account for what he received and not for what he ought to or might have received if the moneys had been profitably dealt with.<sup>13</sup> That is, in the absence of fraud or other misconduct, the only account the *karta* is liable for is as to the existing state of the property divisible,<sup>14</sup> and the parties have no right

<sup>12</sup> *Obhoy v. Pearee*, 13 W.R. 75, F.B.

<sup>13</sup> *Arumilli v. Arumilli*, 48 I.A. 280 : 44 Mad. 656 : 29 C.W.N. 1 : 61 I.C. 690 : 1922 P.C. 71 : 34 C.L.J. 56 : 3 Pat. L.T. 1 : 3 M.L.T. 1 : 41 M.L.J. 33 : 19 A.L.J. 621 : 23 Bom. L.R. 920.

<sup>14</sup> *Parmeshwar v. Gobind*, 43 Cal. 459 : 33 I.C. 190 ; *Bhowani Prasad v. Juggernath*, 13 C.W.N. 309 ; *Nibaran v. Nirupama*, 26 C.W.N. 517, 528 ; *Raja Setrucherlu v. Raja Setrucherlu*, 22 Mad. 470, P.C. ; *Balakrishna v. Muthusami*, 32 Mad. 271 ; *Sriranga v. Srinivasa*, 50 Mad. 867 ; *Narayan*

to look back and claim relief against past inequality of enjoyment or other matters.<sup>15</sup>

The principle seems to be that a coparcener must be deemed to have acquiesced in the conduct of the manager if he does not immediately interfere. In such cases, a distinction has therefore been sought to have been made out between a minor and an adult coparcener, on the ground that a minor cannot be deemed to have acquiesced in the conduct of the manager. But this distinction seems to be contrary to the principle.<sup>16</sup> The liability to account must be the same irrespective of the minority or majority of the coparcener.<sup>17</sup>

When at the instance of a coparcener partition of a joint family has been decreed, it has been held that the manager is liable to account for from the time since the institution of the suit, because subsequent to the date of the suit the parties become tenants-in-common or co-sharers.<sup>18</sup> On the contrary, it has been held that although there is a severance of interest

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*v. Nalhaji*, 28 Bom. 201, 208; *Konerrav v. Gurav*, 5 Bom. 589, 595; *Ramnath v. Goturam*, 44 Bom. 179, 183; 54 I.C. 115; *Jyotibati v. Luchmeshwar*, 8 Pat. 818: 1930 Pat. 1: 120 I.C. 770.

15 *Sriranga v. Srinivasa*, 50 Mad. 867; *Samalbhai v. Sameshwar*, 5 Bom. 38; *Bhowani Prasad v. Juggernath*, 13 C.W.N. 309; *Jyotibati v. Luchmeshwar*, 8 Pat. 818: 1930 Pat. 1: 120 I.C. 770; see also *Ganpat v. Annaji*, 23 Bom. 144. In *Damodardas v. Uttamram*, 17 Bom. 271, 279, it was, however, held that a manager of Hindu family cannot refuse to render any account whatever of his management on the occasion of a partition, or require the other members of the family to accept his *ipse dixit* as to the property subject to partition. The case reported in 5 Bom. 589 was distinguished as that case related to partition between members who have been in possession of different portions of property and that case was not one where a member had the exclusive management of the family property. In a later case of the same Court, *Ramnath v. Gaturam*, 44 Bom. 179, it has been held that a manager is not obliged to keep accounts while the family remains joint, and this seems to be the prevailing judicial opinion.

16 See Mulla, Hindu Law, p. 269, 7th edn.

17 *Sri Ranga v. Srinivasa*, 50 Mad. 866.

18 *Sri Ranga v. Srinivas*, 50 Mad. 866, 874; *Tamireddi v. Gangireddi*, 70 I.C. 337 (Mad.).



from the date of the suit, it does not follow that the joint family property does not remain till it is actually divided, and so the manager of a joint family is not obliged to keep accounts of the family property immediately after the suit.<sup>19</sup>

This view, it is respectfully submitted, is contrary to the principle of joint tenancy in Hindu law. The liability of the manager is limited not for the property being joint or separate but for the peculiar relationship in which each of the members stands to the other, so that when this status is once disturbed the manager cannot claim immunity from liability to account for his acts done subsequent to the cessation of the former relationship.

6. In determining whether a group of persons is or is not a firm, or whether a person is or is not a partner in a firm, regard shall be had to the real relation between the parties, as shown by all relevant facts taken together.

Mode of determining  
existence of partnership.

*Explanation 1.*—The sharing of profits or of gross returns arising from property by persons holding a joint or common interest in that property does not of itself make such persons partners.

*Explanation 2.*—The receipt by a person of a share of the profits of a business, or of a payment contingent upon the earning of profits or varying with the profits earned by a business, does not of itself make him a partner with the persons carrying on the business;

and, in particular, the receipt of such share or payment—

(a) by a lender of money to persons engaged or about to engage in any business,

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<sup>19</sup> *Janardhan v. Wasu Deo*, 79 I.C. 19 (Nag.).

- (b) by a servant or agent as remuneration,
- (c) by the widow or child of a deceased partner, as annuity, or
- (d) by a previous owner or part owner of the business, as consideration for the sale of the goodwill or share thereof.

does not of itself make the receiver a partner with the persons carrying on the business.

**Real intention distinguished from expressed intention :—**

This section is to be read along with the definition of partnership given in section 4. This section is a comprehensive statement of the rule in the leading case of the nature of partnership, *Cox v. Hickman*,<sup>20</sup> which has been followed in innumerable decisions. The English decisions are remarkable in the insistence they show on the real relation between the parties in a disputed partnership and not merely on the expressed intention of the parties. A and B may in a written agreement have stated expressly that they are not partners, yet the Courts have held them to be partners; or they may have stated that they are partners and the Courts have held them not to be partners. The course taken by the Judges has been to examine all the incidents of the relation between the parties, as shown in the written agreements, verbal agreements or mere conduct, to lay no special stress on no particular fact and no particular legal element in partnership, but to take all the facts impartially into account and from them to deduce the real relation between the parties. The section is intended to guide the Courts in India along these lines.<sup>21</sup> Thus it has been held that a mere statement that the parties are to be partners will not necessarily constitute them partners in law.<sup>22</sup> The use of the word 'partner' or 'partnership' in the agreement does not necessarily

<sup>20</sup> 8 H.L.C. 268; see under Explanation 2.

<sup>21</sup> Notes on Clauses.

<sup>22</sup> *Raghunandan v. Hormasji*, 51 Bom. 342 : 1927 Bom. 187 : 100 I.C. 1025 : 29 Bom. L.R. 207.

show that there was a partnership. The parties may call themselves partners, but if it appears that one party is to do nothing more than advance money to the other, and is to be paid by a share of the profits, they must be treated as creditor and debtor.<sup>23</sup>

On the other hand, a statement in a document that nothing therein contained is to constitute the relationship of partners will not necessarily prevent the parties from being partners in the eyes of the law.<sup>24</sup> 'If a partnership in fact exists, a community of interest in the adventure being carried on in fact, . . . no verbal equivalent for the ordinary phrases of profit and loss, no indirect expedient for enforcing control over the adventure will prevent the substance and reality of the transaction from being adjudged to be a partnership'.<sup>25</sup> Further, although two persons may hold themselves out to be partners and be liable to third parties accordingly, yet it does not necessarily follow that they would be partners *inter se*.<sup>26</sup>

### Explanation 1.

**Partnership and Co-ownership** :—This explanation should be read as ancillary to section 4. Mere co-ownership is distinct from partnership, though, of course, co-owners may be co-partners, and in some cases the distinguishing features are difficult to discover. To find the jural relation between the parties, the guiding principle is what is laid down in sec. 4 as shown by all relevant facts. 'If several persons jointly purchase goods for re-sale, with a view to divide the profits arising from the transaction, a partnership is thereby created.'<sup>27</sup> But persons who join in the purchase of goods, not for the

<sup>23</sup> *Mohamad Yusuf v. Pirmohamad*, 65 I.C. 368 : 1922 Nag. 67; *Bhaggu Lal v. De Gruyther*, 4 All. 74.

<sup>24</sup> *Raghunandan v. Hormasji*, 51 Bom. 342 : 1927 Bom. 187 : 100 I.C. 1025 : 29 Bom. L.R. 207.

<sup>25</sup> *Per Lord Halsbury*, in *Adam v. Newbigging*, (1888) 13 App. Cas. 308, 315.

<sup>26</sup> *Raghunandan v. Hormasji*, 51 Bom. 342 : 1927 Bom. 187 : 100 I.C. 1025 : 29 Bom. L.R. 207.

<sup>27</sup> *Reid v. Hollinshead*, 4 B. & C. 867.

purpose of selling them again and dividing the profits, but for the purpose of dividing the goods themselves, are not partners and are not liable to third parties as if they were.”<sup>28</sup> In the latter case there is combination of property but there is no agreement “to share the profits of a business carried on by all or any of them acting for all” and hence the second and third elements of partnership as defined in section 4 are wanting. Thus in *Coope v. Eyre*,<sup>29</sup> there was an agreement between several persons that one of them should purchase oil and divide it amongst all in proportion to the price paid by each of them. After the purchase the purchaser went bankrupt but the seller could not make the others liable for the price as there was no partnership between them, the second and third elements of which were lacking. Similarly if two persons jointly make a purchase and then divide the things purchased, they are not partners.<sup>30</sup> To constitute a partnership, the property of the co-owners must be employed for some purpose which produces a return in the shape of profits or which adds to its value.<sup>31</sup>

This section is an application of the principle that partnership is not the result of an agreement to share gross returns. If co-owners use their land or other property for the purpose of carrying on any business, they are partners as regards the business, and *prima facie* also as regards the property employed,<sup>32</sup> though not necessarily so as regards the latter.<sup>33</sup> Thus if two persons owning a race-horse in common agree that one of them should be in charge of the animal, spend a certain amount for his keep and divide his winnings and expenses equally, they are not necessarily partners as regards the horse,

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<sup>28</sup> Lindley, p. 29.

<sup>29</sup> 1 H. Bl. 37; 2 R.R. 707.

<sup>30</sup> *Gibson v. Lupton*, 9 Bing. 297.

<sup>31</sup> *Kay v. Jonston*, (1856) 21 Beav. 536, 537. Halsbury, Vol. 22, p. 6, para. 7.

<sup>32</sup> *Foster v. Hale*, (1798) 3 Ves. 696; *Waterer v. Waterer* (1873) L.R. 15 Eq. 402; *Syers v. Syers* (1876) 1 App. Cas. 174.

<sup>33</sup> *Crawshay v. Maule*, (1818) 1 Swan. 495, 518; *French v. Styring*, (1857) 2 C.B.N.S. 357; *Meyer v. Sharpe*, (1813) 5 Taunt. 74; *Davis v. Davis*, (1894), 1 Ch. 393. Halsbury, Vol. 22, p. 6, para. 7.

although there may be a partnership between them in the business of running it for profit.<sup>34</sup> Lord Lindley thus discriminates the two: "If each owner does nothing more than take his share of the gross returns obtained by the use of the common property, partnership is not the result. On the other hand, if the owners convert those returns into money, bring that money into a common stock, defray out of it the expenses of obtaining the returns, and then divide the net profits, partnership is created in the profits, if not also in the property which yields them."<sup>35</sup> The main distinction between co-ownership and partnership lies in the fact that necessarily co-ownership does not exist for the sake of gain, nor arises out of agreement nor involves community of profit and loss. A co-owner is not an agent of the others nor has a lien on the common property for their share of common debt or for outlays and expenses. On the other hand, a co-owner can transfer his interest by way of assignment or otherwise even against the will of the other co-owners and the assignee is entitled to stand in his shoes and can demand partition in specie of land owned in common. 'Whether co-owners are also partners is a question of evidence. The mode in which the property has been dealt with and divided and the way in which it and the proceeds and income thereof have been treated in the books are important.'<sup>36</sup>

The distinction between co-ownership and co-partnership prevails in a marked degree in the case of ships. The share of gross returns to be paid by one co-owner to another for exclusive management of the ship owned by them represents the rents for his share of the ship.<sup>38</sup> But cases may sometimes occur in which a partnership exists between persons owning a ship, and a ship may be a part of the assets of the firm ; but in such a case some contract of partnership exists between the parties, or some joint business is carried on by them to which

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<sup>34</sup> *French v. Styring*, 2 C.B.N. S. 357.

<sup>35</sup> Lindley, p. 29.

<sup>36</sup> Halsbury, Vol. 22, p. 5, para. 6.

<sup>38</sup> *Burnard v. Aaron*, (1862) 31 L.J.C.P. 334.

the owning of the ships is merely accessory.<sup>39</sup> Where the co-owners of a boat employ it to earn freight they become partners in respect of such earnings and a suit for dissolution of such partnership is maintainable although the plaintiff, being merely a co-owner, is not entitled to a decree for the sale of the boat employed by the partnership.<sup>40</sup>

### Explanation 2.

**Old law** :—Clauses (a), (b), (c) and (d) correspond to sections 240, 242, 243 and 244 of the Indian Contract Act.

**(a) Lender as opposed to partner** :—This rule is subsidiary to the central rule contained in first paragraph of the section. A loan to a person engaged in any trade upon a contract with such person that the lender shall receive interest and also a share of the profits does not by itself constitute the lender a partner.<sup>41</sup> Participation in the profits of a business is one of the tests for determining whether a person is a partner. But although a right to participate in the profits of trade is a strong test of partnership, and there may be cases where from such participation alone partnership may, as a presumption, not of law but of fact, be inferred, yet whether that relation does or does not exist must depend on the real intention and contract of the parties.<sup>42</sup> The receipt of a share of profits, or of an income fixed by reference to profits, is *prima facie* evidence of partnership; and if it is the only circumstance from which the intention of the parties can be inferred, they are partners.<sup>43</sup> But a right to participate in profits, though a strong test of

<sup>39</sup> *Hyder Ali v. Elahee Bux*, 8 Cal. 1011, 1013.

<sup>40</sup> *Vanamatti Sattiraju v. Bollapragada*, 41 Mad. 939.

<sup>41</sup> *Nagendrier v. Muthiah Bagavathar*, 1927 Mad. 1096 : 101 I.C. 93 : 52 M.L.J. 303.

<sup>42</sup> *Mollwo, March & Co. v. The Court of Wards*, 18 W.R. 384, P.C. : (1872) L.R. 4 P.C. 419; *Raghumull v. Official Assignee*, 28 C.W.N. 34 : 81 I.C. 17 : 1924 Cal. 424; *Ambadas v. Kosabai*, 1925 Nag. 436 : 89 I.C. 283; *Raghunandan v. Hormasjee*, 51 Bom. 342 : 100 I.C. 1025 : 1927 Bom. 187 : 29 Bom. L.R. 207; *Abdul Rahiman, In re*, 51 Mad. 308 : 112 I.C. 486 : 1928 Mad. 890 : 28 M.L.W. 29 : 55 M.L.J. 12.

<sup>43</sup> *Davis v. Davis*, (1894) 1 Ch. 393. Halsbury, Vol. 22, p. 9, para. 11.

partnership, is not by itself conclusive. The true test of partnership is whether there is really a common business and whether the business is being carried on by the alleged partner or by some other person on his account so that the alleged partner can be regarded as a principal.<sup>44</sup> This was laid down in the leading English case on the point, *Cox v. Hickman*,<sup>45</sup> in which Lord Cranworth said: "It is often said that the test, or one of the tests, whether a person, not ostensibly a partner, is nevertheless, in contemplation of law, a partner, is, whether he is entitled to participate in the profits. This no doubt is, in general, a sufficiently accurate test; for a right to participate in profits affords cogent, often conclusive, evidence that the trade in which the profits have been made was carried on, in part, for, or on behalf of, the person setting up such a claim. But the real ground of liability is, that the trade has been carried on by a person acting on his behalf. When that is the case, he is liable to the trade obligations, and entitled to its profits, or to a share of them. It is not strictly correct to say that his right to share in the profits makes him liable to the trade debts. The correct mode of stating the proposition is to say that the same thing, which entitled him to the one, makes him liable to the other, *viz.*, the fact that the trade has been carried on on his behalf,—*i.e.*, that he stood in the relation of principal towards the persons acting ostensibly as the traders by whom the liabilities have been incurred, and under whose management the profits have been made." Participation in the profits is "very cogent evidence" but, in the words of James, L.J.<sup>46</sup> "that evidence is capable of being controlled by the surrounding circumstances." In the same case Cotton, L.J. puts it thus: "I take it the law is this, that participation in profits is not now conclusive evidence of the existence of a partnership, but it is one of the circumstances, and a very strong one, which are to be taken into consideration for the purpose of seeing whether or not a partnership exists, that is to say, whether there was a

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<sup>44</sup> *Ambadas v. Kasabat*, 1925 Nag. 436 : 89 I.C. 283.

<sup>45</sup> 8 H.L.C. 268.

<sup>46</sup> In *Ex parte Tennant* : In re Howard, 6 Ch. D. 303.

joint business, or putting it in another way, whether the parties were carrying on the business as principals and agents for one another, whether it is a joint business or the business of one only."<sup>47</sup> In *Badeley v. Consolidated Bank*,<sup>48</sup> the Lord Justices held following a catena of cases beginning with *Cox v. Hickman* that participation in profits, although a strong evidence is not conclusive evidence of a partnership, and that the question of partnership must be decided by the intention of the parties to be ascertained from the contents of the written instruments, if any, and the conduct of the parties.<sup>49</sup> Hence the relation of partnership ought not to be implied from the fact of commission of profits and powers of control being given where such relation is opposed to the real agreement and intention of the parties.<sup>50</sup> So the fact of sharing profits will have to be considered along with the evidence relating to other characteristics of partnership, e.g., sharing losses, etc., in deciding whether the parties intended to carry on the business in partnership.<sup>51</sup> If losses as well as profits are shared, the presumption of partnership is stronger.<sup>52</sup> Where there is no voice in the management of the business, a mere advance of money accompanied with a stipulation for a share of profits, does not make the person who advances the money a partner.<sup>53</sup> In consideration for advances made by a third party to a partnership firm, a contract giving the former commission on the net profits together with a provision giving large powers of control over the business for his

<sup>47</sup> See *Vadlal v. Shah Khusal*, 27 Bom. 157, 160, 161.

<sup>48</sup> L.R. 38 Ch. D. 238.

<sup>49</sup> Foll. in *Porter v. Incell*, 10 C.W.N. 313.

<sup>50</sup> *Mollwo, March & Co. v. The Court of Wards*, 18 W.R. 384, P.C.; *Colonel A. R. Porter v. W. Incell*, 10 C.W.N. 313.

<sup>51</sup> *Chockalinga v. Muthuswami*, 1925 Mad. 768 : 87 I.C. 663 : 21 M.L.W. 541 : 48 M.L.J. 518.

<sup>52</sup> *Noakes v. Barlow*, (1872), 26 L.T. 136, Ex. Ch.; *Brett v. Beckwith*, (1856), 26 L.J. (CH.) 130; *Green v. Beesley*, (1835), 2 Bing. (N.C.) 108; *Halsbury*, Vol. 22, p. 9, para. 12.

<sup>53</sup> *In re Abdul Rahman*, 51 Mad. 308 : 112 I. 468 : 1928 Mad. 890 : 28 M.L.W. 290 : 55 M.L.J. 12, e.g., *Muthalalis of a Labhai firm*.



protection without any power to direct transactions does not make him a partner of the firm.<sup>54</sup>

**When a lender is a partner** :—The law is thus stated in Halsbury's Laws of England<sup>54a</sup> :—"But if, on the true construction of the agreement, the real relationship between the parties is not purely and *bonâ fide* that of debtor and creditor, the effect of an advance in consideration of a share of profits may easily be to place the intending lender in the position of a partner with all its consequences and liabilities,<sup>55</sup> even though this may not be the intention of the parties and though the agreement may contain an express declaration to the contrary.<sup>56</sup> If the agreement gives the supposed lender the rights and privileges of a partner,<sup>57</sup> no device or contrivance will enable him to escape the liabilities of a partner. If he is not a partner, he is merely a creditor whose rights are limited by statute.<sup>58</sup> A lender may, however, stipulate for large powers, some of which might be consistent with the position either of a creditor or a sleeping partner; and, if such powers are reasonably necessary for the protection of his interest as a lender, they will not be held to make him a partner."<sup>59</sup>

**Dormant partners** :—The words "of itself" show that the section is not intended to relieve persons who are really partners, although dormant, from the liabilities incident to that position. "Whether a person advancing money and sharing profits is a creditor or a dormant partner is often a very difficult matter to determine, and can only be decided by a careful study of the whole agreement between the parties to the transaction, and especially by examining what rights are conferred on or taken

<sup>54</sup> *Mollwo, March & Co. v. The Court of Wards*, 18 W.R. 384, P.C.

<sup>54a</sup> Vol. 22, p. 12, para. 16.

<sup>55</sup> *Syres v. Syres*, (1876) 1 App. Cas. 174.

<sup>56</sup> *Re Megevand, Ex parte Delhasse*, (1878) 7 Ch. D. 511, C.A.

<sup>57</sup> *Badeley v. Consolidated Bank*, (1888) 38 Ch. D. 238, C.A.; *Debenham v. Phillips*, (1887) 3 T.L.R. 512.

<sup>58</sup> *Re Howard, Ex parte Tennant*, (1877) 6 Ch. D. 303, C.A.; *Kelly v. Scotto*, (1880) 49 L.J. (CH.) 383; *Aktie Bolaget Iggesunds Bruk v. Von Dodelszen*, (1887) 3 T.L.R. 517, C.A.

<sup>59</sup> *Hollom v. Whichelov*, (1895) 64 L.J. (Q.B.) 170.

from the person making the advance. The right of a lender is to be repaid his money with such interest or share of profits as he may have stipulated for ; and his right to a share of profits involves a right to an account and to see the books of the borrower, unless such right is expressly excluded by agreement. If, however, his advance is risked in the business, or forms part of his capital in it, he ceases to be a mere lender and becomes in effect a dormant partner, but the fact that he is to have the management of the business does not necessarily make him a partner.<sup>60</sup>

**(b) Servant or agent paid by a share of profits :—**Neither a servant,<sup>61</sup> nor a *gomostha* of a firm receiving a share of the profits,<sup>62</sup> nor a broker,<sup>63</sup> nor an assistant of a firm of brokers receiving over and above his salary a share in the profits and signing letters and delivery orders in favour of the firm and otherwise taking part in the management of the business,<sup>64</sup> is a partner. Though a *gomostha* is a partner if he shares in losses as well,<sup>65</sup> he is not so if his liability to pay losses is clearly in respect of the losses occasioned by his neglect or default.<sup>66</sup> In a case several persons agreed to work on a profit basis and complete control of the business was retained by one person who contributed the whole capital and who had the power of altering the shares. The executants further agreed to be bound by his orders and that if they contravened the provisions of the agreement they were liable to be dismissed. *Held* that the agreement was not a partnership agreement and the executants were merely employees entitled to a certain share of the profits.<sup>67</sup>

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<sup>60</sup> Lindley, p. 53.

<sup>61</sup> *Moula Bux v. Muhammad Afzal*, 1922 Nag. 96.

<sup>62</sup> *Ramdoyal v. Junmenjoy*, 14 Cal. 791.

<sup>63</sup> *Benjamin v. Porteus*, (1796) 2 Hy. Bl. 590.

<sup>64</sup> *Morrison v. Verschoyle*, 6 C.W.N. 429.

<sup>65</sup> *Firm of Chela Ram v. Kishen Chand*, 155 P.L.R. 1917 : 3 P.W.R. 1918 : 44 I.C. 283.

<sup>66</sup> *Mohamad Yusuf v. Pirmohamad*, 1922 Nag. 67 : 65 I.C. 368.

<sup>67</sup> *Commissioner of Income Tax v. Rowther*, 1927 Mad. 1053 : 106 I.C. 308 : 26 M.L.W. 659 : 1927 M.W.N. 869 : 54 M.L.J. 219, S.B.

But if the servant sharing profits has also an interest in the partnership capital or stock, this additional circumstance goes far to show that a partnership was, in fact, intended.<sup>68</sup> Such would also be the case if he shares losses as well.<sup>68a</sup> If his agreement gives him rights usually given to a partner, or contains provisions applicable to a partner, for example, that he shall not pledge his co-adventurer's credit, the inference of partnership is conclusive.<sup>69</sup>

**(c) Widow or child receiving annuity:—**This follows from the fact that the business may not be carried on after the death of a partner by the surviving partners "acting for" the widow or child of the deceased partner. Hence the mere fact of the assets of the deceased remaining in the business and payments being made to the representatives in respect of them does not necessarily constitute them partners.<sup>70</sup>

**7.** Where no provision is made by contract between the partners for the duration of their partnership, or for the determination of their partnership, the partnership is "partnership at will".

**Partnership at will:—**Where the duration of the partnership is provided for in the partnership agreement, e.g., where there is a provision that the partnership should be terminated by mutual agreement only, it is a partnership for fixed term.<sup>71</sup> Hence, a partner of such partnership cannot retire by merely giving notice to the other partners under sec. 32 (1) (c) as if it were a partnership at will.

**8.** A person may become a partner with another person in particular adventures or undertakings.

Particular partnership.

<sup>68</sup> See *Reid v. Hollinshead*, 4 B. & C. 867; *Ex parte Chuck*, 8 Bing. 469; *Gilpin v. Enderby*, 5 B. & A. 954; *Lindley*, pp. 47, 48.

<sup>68a</sup> *Firm of Chila Ram v. Kishen Chand*, 155 P.L.R. 1917: 44 I.C. 283.

<sup>69</sup> *Moore v. Davis*, (1879) 11 Ch. D. 261; *Pole v. Leask*, (1863) 9 Jur. N.S. 829; *Halsbury*, Vol. 22, p. 11, para. 14.

<sup>70</sup> See *Holme v. Hammond*, L.R. 7 Ex. 218.

<sup>71</sup> *Moss v. Elphick*, (1910) K.B. 846.

**Particular partnership** :—This is particular or special or limited partnership as distinguished from universal or general partnership. The general incidents of partnership are the same in both cases, but in particular partnerships, the rights and liabilities of the parties are necessarily limited to particular adventures or undertakings. Thus two solicitors may be partners in so far as a particular case is concerned when they agree to share the profits accruing therefrom.<sup>72</sup>

## CHAPTER III.

### RELATIONS OF PARTNERS TO ONE ANOTHER.

**9. Partners are bound to carry on the business of the firm to the greatest common advantage, to be just and faithful to each other, and to render true accounts and full information of all things affecting the firm to any partner or his legal representative.**

General duties of partners.

**Good faith among partners** :—This section corresponds to sec. 257 of the Indian Contract Act.

The first portion of this section may seem to be more didactic than legal, but it is the basis for all claims arising from unfair dealings between the partners which are not provided for otherwise.<sup>73</sup> Ordinary partnerships are by the law presumed to be based on the mutual trust and confidence of each partner, not only in the skill and knowledge, but also in the integrity, of every other partner. The utmost good faith is requisite in the relations between partners *inter se*.<sup>74</sup> But, at the same time, it is important to note that partners are not, as such, trustees for each other or for their firm.<sup>75</sup>

<sup>72</sup> *Robinson v. Anderson*, 20 Beav. 98; *M'Gregor v. Bainbridge*, 7 Ha. 164.

<sup>73</sup> Notes on clauses.

<sup>74</sup> Halsbury, Vol. 22, p. 47, para. 88.

<sup>75</sup> *Piddocke v. Burt*, (1894) 1 Ch. 343.

A partnership contract is sometimes described as *uberrimae fidei* which needs a full disclosure of all facts likely to affect the judgment of the intending partner. But Anson does not support this view. Apart from the general principles which invalidate contracts, "there seems to be no rule requiring full disclosure in the formation of a contract of partnership, but since, when the partnership has been formed, the parties stand to one another in the confidential relationship of principal and agent, each partner is bound to disclose to the others all material facts, and to exercise the utmost good faith in all that relates to their common business."<sup>76</sup> "The utmost good faith is due from every member of a partnership towards every other member; and if any dispute arise between partners touching any transaction by which one seeks to benefit himself at the expense of the firm, he will be required to show, not only that he has law on his side, but that his conduct will bear to be tried by the highest standard of honour."<sup>77</sup> Good faith and utmost *bona fides* is required in dealings between working and sleeping partners when matters relating to accounts are concerned, and thus when a working partner produces false accounts and induces a sleeping partner to deliver pro. notes through fraud, the pro. note is vitiated by such fraud.<sup>78</sup>

**Purchase by a partner:**—One of several partners may purchase the share of another for his own benefit and not for the benefit of the firm.<sup>79</sup> But in a transaction between co-partners for the sale by one to the other of a share in the partnership business, there is a duty cast upon the purchaser who knows and is aware that he knows more about the partnership accounts than the vendor to put the vendor in possession of all material facts with reference to the assets and not to conceal what he alone knows. Unless such information is furnished, the sale is voidable and may be set aside.<sup>80</sup> Similarly,

<sup>76</sup> Anson, p. 196, 17th Ed.

<sup>77</sup> See *Blisset v. Daniel*, 10 Ha. 522, 536; Lindley, p. 389.

<sup>78</sup> *Kurundallammal v. Kunhi Kannan*, 1930 Mad. 141 : 123 I.C. 596.

<sup>79</sup> *Cassels v. Stewart*, (1881) 6 App. Cas. 64.

<sup>80</sup> *Law v. Law*, (1905) 1 Ch. 140; see 2 C.L.J. 86n.

where a contract is entered into by one partner with another in relation to the interest of the partnership, the partner is under a duty to make a full disclosure of all the material facts which he knows and which would assist the other parties in deciding whether or not to enter into the contract.<sup>81</sup> So a partner is entitled to purchase partnership property provided there is full disclosure and the parties are at arm's length; it is only where the real truth is concealed and the facts are not disclosed that one partner has a legitimate grievance against the other.<sup>82</sup>

**Disclosure in partnership suits** :—In a partnership action, each party is bound to disclose all the documents in his possession relating to the partnership, and in such cases application for such discoveries ought not to be refused.<sup>83</sup>

**Injunction in case of mismanagement** :—A partner may be restrained by injunction generally from such conduct in the management of the business as would render it impossible for the business to be carried on in a proper manner, or would cause irreparable injury to it.<sup>84</sup>

**10. Every partner shall indemnify the firm for any loss caused to it by his fraud in the conduct of the business of the firm.**

Duty to indemnify for loss caused by fraud.

**Firm's right to be indemnified in case of fraud** :—This is a new provision. If one partner does that which, though imputable to the firm on the principles of agency, is in truth his act alone, and a fraud upon his co-partners, they are entitled, as between themselves and him, to throw the whole of the consequences upon him.<sup>85</sup> The liability of a partner to

<sup>81</sup> *Brunson v. Brunson*, 1925 Mad. 360 : 78 I.C. 299.

<sup>82</sup> *Ramanath v. Pitambar*, 43 Cal. 733; 21 C.W.N. 632 : 22 C.L.J. 339 : 31 I.C. 430.

<sup>83</sup> *Rai Dwarkanath v. Haji Mahomed*, 18 C.W.N. 1025, P.C.; on app. from 11 C.L.J. 658.

<sup>84</sup> *Anderson v. Wallace*, (1826) 2 Mol. 540; *Francis v. Spittle*, (1840) 9 L.J. (CH.) 230.

<sup>85</sup> *Lindley*, pp. 472, 473, citing *Robertson v. Southgate*, 6 Ha. 515.

indemnify the firm for any loss caused to it by his wilful neglect has been provided for in sec. 13(f).

**11. (1)** Subject to the provisions of this Act, the mutual rights and duties of the partners of a firm may be determined by contract between the partners, and such contract may be express or may be implied by a course of dealing.

Determination of rights and duties of partners by contract between the partners.

Such contract may be varied by consent of all the partners, and such consent may be express or may be implied by a course of dealing.

**(2)** Notwithstanding anything contained in section 27 of the Indian Contract Act, 1872, such contracts may provide that a partner shall not carry on any business other than that of the firm while he is a partner.

Agreements in restraint of trade.

**Sub-sec. (1) Contract varying partners' rights and duties :—**Sub-section (1) expresses the rule contained in section 252 of the Indian Contract Act but in a more comprehensive form. The section is an expression of that most important of all principles of partnership law, namely, that as far as possible the partners should have freedom to arrange their own affairs amongst themselves. It will allow arrangements to be made from time to time, formally or informally, on all matters which affect the partners only. In pursuance of this idea the remaining sections of this Chapter, and some in Chapter V and VI, are "subject to contract between the partners", that is, they express rules which are applicable in the absence of contracts varying them.<sup>86</sup>

**Mode of dealing :—**The mode of dealing adopted by partners is evidence of the formation and original terms of a partnership if such terms are not set forth in any document.

Partners are bound by the duties and obligations which are implied in every partnership contract if, and so far as, the express contract does not deal with them.<sup>87</sup>

The original terms of a partnership, even if evidenced by a written instrument, may be varied by mutual consent ; and the mode of dealing adopted or acquiesced in by all the partners is sufficient evidence of such variation.<sup>88</sup> Thus an agreement not to draw and accept bills of exchange in a partner's own name without the concurrence of the other partners may be taken to have been varied by mutual consent by a course of dealing showing that the partners habitually permitted one of them to draw and accept bills in the firm's name without their concurrence.<sup>89</sup> The rights and duties of partners as defined by statute may be varied in the same way.<sup>90</sup>

**Sub-Sec. (2). Agreement in restraint of trade :—**Sub-section (2) reproduces exception 3 to section 27 of the Indian Contract Act as the subject matter fits in more aptly here, and the exception has accordingly been repealed.

The conduct of the **12. Subject to contract between the partners—**  
business.

- (a) every partner has a right to take part in the conduct of the business ;
- (b) every partner is bound to attend diligently to his duties in the conduct of the business ;
- (c) any difference arising as to ordinary matters connected with the business may be decided by a majority of the partners, and every partner shall have the right to express his opinion before the matter

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<sup>87</sup> *Smith v. Jeyes*, (1841) 4 Beav. 503; *Halsbury*, Vol. 22, p. 22, para. 34.

<sup>88</sup> *Halsbury*, Vol. 22, p. 22, para. 34.

<sup>89</sup> *Const v. Harris*, (1824) T. & R. 523.

<sup>90</sup> *Halsbury*, Vol. 22, pp. 22, 23, para. 34.



is decided, but no change may be made in the nature of the business without the consent of all the partners; and

- (d) every partner has a right to have access to and to inspect and copy any of the books of the firm.

**Old law :—**Clause (a) corresponds to sec. 253 (3) of the Indian Contract Act. Clause (b) is sec. 253 (4) but the words "and is not entitled to any remuneration for acting in such business" found therein have been made a separate clause in sec. 13 (a). Clause (c) is section 253 (5). Clause (d) is new.

**Contract to contrary :—**The provisions of this section are subject to contract to the contrary which may be proved by an express declaration to that effect or may be determined from the conduct of the parties.<sup>91</sup>

**(a) Right of management :—**In the absence of an express agreement to the contrary, the powers of the members of an ordinary partnership are in all respects equal, even although their shares may be unequal; and there is no right on the part of one or more to exclude another from an equal management in the concern.<sup>92</sup> 'Indeed, speaking generally, it may be said that nothing is considered as so loudly calling for the interference of the Court between partners, as the improper exclusion of one of them by the others from taking part in the management of the partnership business.'<sup>93</sup> 'It, is, however, not competent for those who have agreed to take no part in the management to transact the partnership business without the consent of all the other partners. But every member of an ordinary firm is *prima facie* its agent for the carrying on its business in the usual way; and persons dealing with a partner within the limits of his apparent authority are

<sup>91</sup> See *Haramohan v. Sudarsan*, 25 C.W.N. 847: 66 I.C. 811: 1921 Cal. 538.

<sup>92</sup> *Rowe v. Wood*, 2 Jac. & W. 558; see too *Lloyd v. Loaring*, 6 Ves. 777.

<sup>93</sup> *Ibid*, Lindley, p. 387.

entitled to hold the firm answerable for his conduct, unless such persons had distinct notice that his real authority was less extensive than they had a right to assume it to be.<sup>94</sup>

**(b) Diligent conduct of business.—**

**Gross negligence and misconduct as opposed to error of judgment** :—If in a suit for dissolution for partnership and for accounts, the defendant is charged with negligence, and compensation is claimed from him for losses, the defendant is not liable if he can show that he used such skill and judgment as he possessed in the conduct of the business. If a partner fall into an error in the management from want of a larger share of prudence and skill than he was truly master of, he is not liable for the consequences. Good faith is required in a partner as well as diligence, and if a partner is guilty of gross negligence, unskilfulness, fraud or wanton misconduct in the course of the partnership business, he is ordinarily responsible to the other partners for all losses and damages sustained thereby.<sup>95</sup>

This sub-section defines the duty of a partner to attend diligently to his duties in the conduct of the business whereas sub-section (f) of sec. 13 states the effect of breach of this duty.

**(c) Voice of majority** :—This clause makes a distinction, following the English law, between 'ordinary matters connected with the business' and a 'change in the nature of business.' The majority can bind the minority only where the difference arises as to ordinary matters connected with the business, that is, matters incidental to the carrying on of the legitimate business of the partnership but not when the difference is with respect to matters which involve a change in the nature of the business, that is, matters with which it was never intended that the partnership should concern itself, in which cases even a single partner is entitled to forbid a change against a majority however large it may be. And where it involves a change in the business, it is of no consequence that the change would be

<sup>94</sup> Lindley, p. 388.

<sup>95</sup> *Sasthi Kinkar v. Man Govinda*, (1919) Pat. 419

extremely profitable.<sup>96</sup> Thus while the majority may borrow money against the wishes of the minority,<sup>97</sup> they cannot convert a fire and life insurance company into a marine insurance company.<sup>98</sup> In the latter case Lord Eldon observed: "If six persons joined in a partnership of life-insurance, it seems clear that neither the majority, nor any select part of them, nor five out of the six, could engage that partnership in marine insurances unless the contract of partnership expressly or impliedly gave that power; because, if it were otherwise, an individual, or individuals, by engaging in one specified concern, might be implicated in any other concern whatever, however different in its nature, against his consent. . . . They who seek to embark a partner in a business not originally part of the partnership concern, must make out clearly that he did expressly or tacitly acquiesce."

Further, in order that the majority may bind the minority, they must act in perfect good faith. As Lord Eldon said: "I call that the act of all, which is the act of the majority, provided all are consulted and the majority are acting *bona fide*, meeting, not for the purpose of negating what anyone may have to offer, but for the purpose of negating what, when they are met together, they may, after due consideration, think proper to negative. For a majority of partners to say, We do not care what one partner may say; we, being the majority, will do what we please, is I apprehend, what a court of equity will not allow."<sup>99</sup> On the other hand, the minority must not be merely obstructive, and may, after reasonable discussion, be closed.<sup>1</sup>

When, however, the partners are equally divided, those

<sup>96</sup> *A. G. v. G. N. Ry.*, 1 Dr. & Sm. 154.

<sup>97</sup> See *Byron v. The Metropolitan Saloon Omnibus Co.*, 3 De. G. & J. 123; *Australian Auxillary Steam Clipper Co. v. Mounsey*, 4 K. & J. 733.

<sup>98</sup> *Natusch v. Irving*, cited in Lindley, 4th Ed., p. 603. The judgment has not been reprinted in the 9th Edn. as unnecessary in view of sec. 24, Partnership Act, 1890.

<sup>99</sup> *Const v. Harris*, (1824) Turn. & R. 496, 525.

<sup>1</sup> See *Wall v. London and N. A. Corporation*, (1898) 2 Ch. 469, C. A. Halsbury, vol. 22, p. 49, f.n. q.

who forbid a change must have their way. Thus one partner cannot either engage a new or dismiss an old servant against the will of his co-partner.<sup>2</sup>

**(d) Inspection of partnership books :—**‘Any partner’ includes even a dormant partner.<sup>3</sup> Subject to reasonable limitations, an agent of a partner is entitled to have access to and inspect and copy the books.<sup>4</sup> If a partner has kept accounts relating to the partnership in private books of his own, he must produce such books, for he should have kept his private accounts elsewhere, if he did not want them to be seen. After a dissolution, if the books relate to the accounts which have to be taken, they must be produced.<sup>5</sup>

But a partner or agent is bound to abstain from making improper use of information so obtained,<sup>6</sup> and items not connected with the partnership business may be sealed up.<sup>7</sup>

Mutual rights and liabilities. **13. Subject to contract between the partners—**

- (a) a partner is not entitled to receive remuneration for taking part in the conduct of the business;
- (b) the partners are entitled to share equally in the profits earned, and shall contribute equally to the losses sustained by the firm;
- (c) where a partner is entitled to interest on the capital subscribed by him such interest shall be payable only out of profits;

<sup>2</sup> See *Donaldson v. Williamson*, 1 Cr. & M. 345; Lindley, p. 403.

<sup>3</sup> *Bevan v. Webb*, (1901) 2 Ch. 59; *Daft*, 10 Bom. L.R. 811.

<sup>4</sup> *Bevan v. Webb*, (1901) 2 Ch. 59, C.A.

<sup>5</sup> *Dipchand v. Kishnibai*, 118 I.C. 873 : 23 S.L.R. 313 : 1928 Sind 133; *Pickering v. Pickering*, 32 W.R. 511 (Eng.); *Toulman v. Copland*, 3 Y. and C. 625 rel. on.

<sup>6</sup> *Trego v. Hunt*, (1896) A.C. 7, 26.

<sup>7</sup> *Re Pickering, Pickering v. Pickering*, (1883) 25 Ch. D. 247, C.A. *Halsbury*, Vol. 22, pp. 65, 66, para. 128.

- (d) a partner making, for the purposes of the business, any payment or advance beyond the amount of capital he has agreed to subscribe, is entitled to interest thereon at the rate of six per cent. per annum;
- (e) the firm shall indemnify a partner in respect of payments made and liabilities incurred by him—
  - (i) in the ordinary and proper conduct of the business, and
  - (ii) in doing such act, in an emergency, for the purpose of protecting the firm from loss, as would be done by a person of ordinary prudence, in his own case, under similar circumstances; and
- (f) a partner shall indemnify the firm for any loss caused to it by his wilful neglect in the conduct of the business of the firm.

**Old law** :—Clause (a) is the latter part of sec. 253 (4), Indian Contract Act, and clause (b) is sub-section (2) of sec. 253. The other clauses are new.

**(a) Partner's remuneration for services rendered :—**

Under ordinary circumstances, the contract of partnership excludes any implied contract for payment of services rendered for the firm by any of its members; consequently in the absence of any agreement to that effect, one partner cannot charge his co-partners with any sum for compensation, whether in the shape of salary, commission or otherwise, on account of his own trouble in conducting the partnership business.<sup>8</sup> And in this respect a managing partner is in no different position from

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<sup>8</sup> *Thompson v. Williamson*, 7 Bligh. N.S. 432.

any other partner.<sup>9</sup> This doctrine has been applied even where the amount of services rendered by the partners is exceedingly unequal.\* In such a case, a remuneration to be paid to either partner for personal labour exceeding that contributed by the other is considered as left to the honour of the other, and it has been said that where this principle is wanting a Court of Justice cannot supply it.<sup>10</sup> If therefore, a partner who entertains customers wishes to be reimbursed he should take the precaution of having an agreement made for an allowance.<sup>11</sup> Where, however, it is the duty of each partner to attend to the partnership business and one partner in breach of his duty wilfully leaves the other to carry on the partnership business unaided, the Court may, upon dissolution of partnership, decree an allowance in favour of the partner who has carried on the business alone.<sup>12</sup> Where a partner is a *pardanishin* lady and is unable by reason of her station of life to take an active interest in the management of the partnership business, it is just and equitable that some allowance should be made in favour of the other partners who undertake the responsibility of conducting the business.<sup>13</sup> In taking the accounts of a partnership a proper allowance should be made for the fact that the services of certain partners were withheld.<sup>14</sup>

The rule which precludes a partner from charging his co-partners with payment for his services, does not apply to services rendered in carrying on the business of the firm after

<sup>9</sup> *Hutcheson v. Smith*, 5 Ir. Eq. 117.

\* See *Hassanand Jethanand v. Bassarmal*, 108 I.C. 724 : 1928 Sind 146 : 23 S.L.R. 389 where the English cases are referred to.

<sup>10</sup> *Webster v. Bray*, 7 Hare 159, where an allowance for trouble was made to the defendant because it was offered by the plaintiff; *Robinson v. Anderson*, 20 Beav. 98, where no allowance was offered and none was given by the Court.

<sup>11</sup> *Dipchand v. Kishnibai*, 1928 Sind 133 : 108 I.C. 873 : 23 S.L.R. 313.

<sup>12</sup> *Atrey v. Borham*, 20 Beav. 620.

<sup>13</sup> *Gokul Krishna v. Sashimukhi*, 16 C.W.N. 299, 303.

<sup>14</sup> *Krishnamachartar v. Sankara Sah*, 25 C.W.N. 314, P.C. ; 57 I.C. 713 : 1921 P.C. 91 : 22 Bom. L.R. 1343 : 28 M.L.T. 265 : 33 C.L.J. 1 : 39 M.L.J. 257 : 12 M.L.W. 777.

its dissolution ; and it has been held that a surviving partner who carries on the business of the firm for the benefit thereof is entitled to remuneration for his trouble in so doing,<sup>15</sup> unless no profits have been made in carrying on the business,<sup>16</sup> or there be some special reason to the contrary, as where he is the executor of the deceased partner.<sup>17</sup>

Where the plaintiff entered into a partnership agreement with the defendant under which the plaintiff agreed to render services for remuneration, *held*, in a suit for remuneration, that it would be inequitable to allow the claim of the plaintiff without dissolution of the partnership and rendition of accounts.<sup>18</sup>

**(b) Right to profits and liability for losses :—**In the absence of any evidence as to the terms and conditions obtaining in a partnership, all partners are entitled to share equally in the profits of a partnership business and must contribute equally to its losses.<sup>19</sup> So where a partnership of two persons is dissolved by the death of one of them, the presumption is that the deceased was entitled to a moiety of the assets.<sup>20</sup> Owing to the presumption as to the equality of shares the burden of proof is cast upon the party who alleges a specific agreement that the shares were to be unequal.<sup>21</sup> But the rule of equality may be negatived by the terms of the contract<sup>22</sup> or by the course of dealing.<sup>23</sup> But the proportion of losses to be borne to profits shared is not negatived by the fact that additional

<sup>15</sup> *Featherstonhaugh v. Turner*, 25 Beav. 4382; *Brown v. De Tastet*, Jac. 284; *Crawshay v. Collins*, 2 Russ. 347; *Page v. Ratcliffe*, 75 L.T. (N.S.) 371.

<sup>16</sup> *Re Aldridge, Aldridge v. Aldridge*, (1894) 2 Ch. 97.

<sup>17</sup> *Burden v. Burden*, 1 V. & B. 172; *Stocker v. Dawson*, 6 Beav. 371; *Lindley*, p. 482.

<sup>18</sup> *Pala Ram v. Chela Mal*, 38 P.R. 1914.

<sup>19</sup> *Beejon Bee v. Fatima Bibee*, (1910) M.W.N. 669.

<sup>20</sup> *Keshav v. Rayapa*, 12 B.H.C.A.C. J. 165.

<sup>21</sup> *Jadobram v. Belloram*, 26 Cal. 281.

<sup>22</sup> *Robby v. Brooke*, (1833) 7 Bli. N.S. 90 H.L.; *Warner v. Smith*, (1863) 1 De G. J. & Sm. 337, C.A.

<sup>23</sup> *Stewart v. Forbes*, (1849) 1 Mac. & G. 137.

capital was contributed by one partner,<sup>24</sup> nor by the fact that the loss is merely attributable to the acts of a partner.<sup>25</sup> The right to claim a share of profits may be lost by laches, where the interest is executory ; but mere laches does not divest a partner of an interest which is executed, unless it amounts to an agreement or licence or abandonment of his rights.<sup>26</sup>

**Assignee's right** —The assignee of a share in a partnership has no independent rights ; (a) he is entitled to the share of the profits to which the assigning partner would be otherwise entitled ; (b) the assignee must accept the account of profits agreed to by his partners ; (c) in the case of a dissolution he is entitled to receive the share of the partnership assets to which the assignor would have been otherwise entitled, and for the purpose of ascertaining that share to an account as from the date of dissolution.<sup>27</sup>

**(c) Where a partner is entitled to interest** :—"Partners are not entitled to interest on their respective capitals unless there is some agreement to that effect ; such an agreement may be inferred if they have themselves been in the habit of charging such interest in their accounts. Even where one partner has brought in his stipulated capital and the other has not, the former will not be entitled to interest on the winding up of the partnership if it has not been previously charged and allowed in the accounts of the firm ;<sup>28</sup> and where a person is paid for his services by a share of profits, interest on capital cannot be charged against him, unless there is some agreement to that effect.<sup>29</sup> Moreover, where interest on capital is payable, the interest stops at the date of dissolution unless otherwise agreed."<sup>30</sup> Profits left in the business are not necessarily regarded as capital, for example, for the purpose of bearing

<sup>24</sup> *Nowell v. Nowell*, (1869) L.R. 7 Eq. 538.

<sup>25</sup> *Cragg v. Ford*, (1842) 1 Y. & C. Ch. Cas. 280.

<sup>26</sup> Halsbury, Vol. 22, p. 63, para. 122.

<sup>27</sup> *Chidambaram v. Karuthan*, (1916) 2 M.W.N. 18. See section 29.

<sup>28</sup> *Hill v. King*, 3 De G. & J. & Sm. 418.

<sup>29</sup> *Rishton v. Grisset*, 5 Eq. 326.

<sup>30</sup> *Barfield v. Laughborough*, 8 Ch. 1; *Watney v. Wells*, 2 Ch. 250; *Lindley*, pp. 477; 478.



interest, unless there is an agreement to this effect, or unless they are treated as capital into the partnership books.<sup>31</sup>

A partner is not charged with interest in respect of over-drawings.<sup>32</sup> Similarly interest on moneys drawn by a partner from the partnership funds—be it capital or interest—cannot be allowed unless it is so provided in the deed.<sup>33</sup> But interest is allowed on the restitution of money of the firm which has been expended or withheld by a partner, and of secret profits made by a partner in breach of good faith towards his partners.<sup>34</sup>

In an action to dissolve and wind up the affairs of a partnership until the accounts have been taken it is impossible to say what if anything is due from any partner or co-partners. Interest, therefore, should only be allowed to the plaintiff from the date of final decree by which the amount if any is found to be due from defendants and not from the date of the plaint.<sup>35</sup>

**(d) Interest on advance :—**Interest is not allowed by a Court in partnership suits except on sums advanced in excess of the capital agreed to be contributed,<sup>36</sup> but subject to agreement between the parties, interest is payable on money paid or advanced by one partner for partnership purposes beyond his amount of capital,<sup>37</sup> which is treated not as an increase of capital but as a loan.<sup>38</sup>

<sup>31</sup> *Dinham v. Bradford*, (1869) 5 Ch. App. 519, 524. Halsbury, Vol. 22, p. 64, para. 123.

<sup>32</sup> *Suleman v. Abdul Latif*, 1930 P.C. 185 : 34 C.W.N. 737 : 1930 A.L.J. 868.

<sup>33</sup> *Meymott v. Meymott*, (1862) 32 L.J. Ch. 218, foll.; *Umamaheswara v. Munnuswami*, 1926 Mad. 624 : 94 I.C. 306 : 1926 M.W.N. 465 : 50 M.L.J. 428.

<sup>34</sup> *Evans v. Coventry*, (1857) 8 De. G. M. & G. 835, C.A.; *Hart v. Clarke*, (1854) 6 De. G.M. & G. 232, 254, C.A.; *Fawcett v. Whitehouse*, (1829) 1 Russ. & M. 132; *York & North Midland Ry. Co. v. Hudson*, (1853) 16 Beav. 485, 505; Halsbury, Vol. 22, p. 65, para. 126.

<sup>35</sup> *Suleman v. Abdul Latif*, 1930 P.C. 185 : 34 C.W.N. 737 : 1930 A.L.J. 868.

<sup>36</sup> *Mst. Ram Plari v. Sultan Bukhsh*, 3 Lah. 382 : 1928 Lah. 115 : 77 I.C. 207; *Dipchand v. Kishnibal*, 1923 Sind 133 : 108 I.C. 873 : 23 S.L.R. 313.

<sup>37</sup> *Gobinda v. Haridas*, 20 C.W.N. 634.

<sup>38</sup> *Govind v. Gajrasingh*, 1921 Nag. 45 : 64 I.C. 283 : 4 N.L.J. 139.

Interest on advances up to the date not of the dissolution which had been effected by a preliminary decree but right up to the date of the final decree cannot be allowed.<sup>40</sup>

**(e) Partner's right to be indemnified :—**This sub-clause is based upon the principle that every member of the partnership is an agent of the firm, and in order that a member may be entitled to be indemnified in respect of obligations incurred by him, they must be incurred in the ordinary and proper conduct of the business, or in protecting the firm from loss in an emergency if such obligations would have been incurred by a prudent man in his own case in similar circumstances. 'The right extends to expenditure for partnership purposes made with the express or implied consent of the other partners,'<sup>41</sup> and it is immaterial that the expenditure proves to be useless or unprofitable if it has been approved of or ratified by the firm.<sup>42</sup> This right of indemnity does not extend to joint transactions where no partnership subsists.<sup>43</sup> Nor does it extend to sums paid by a partner for which the partnership is not liable.<sup>44</sup> 'A partner has no right to charge the firm with losses or expenses incurred by his own negligence or want of skill, or in disregard of the authority reposed in him.'<sup>45</sup> 'The right to indemnity may be lost by laches<sup>46</sup> or by agreement between the partners whereby the partnership effects are converted into the separate property of each.'<sup>47</sup>

<sup>40</sup> *Umamaheswara v. Munuswami*, 1926 Mad. 642 : 94 I.C. 306 : 1926 M.W.N. 465 : 50 M.L.J. 428; *Barfield v. Lough Borough*, (1872) 8 Ch. 1 foll.

<sup>41</sup> *Hamilton v. Smith*, (1859) 7 W.R. 173 (Eng.); *Gleadow v. Hull Glass & Co.*, (1849) 13 Jur. 1020; *Matthews v. Ruggles-Brise*, (1911) 1 Ch. 194.

<sup>42</sup> *Cragg v. Ford*, (1842) 1 Y. & C. Ch. Cas. 280.

<sup>43</sup> *Sedgwick v. Daniell*, (1857) 2 H. & N. 319.

<sup>44</sup> *Re Webb*, (1818) 2 Moore (C.P.) 500; *M'Ireath v. Margetson*, (1785) 4 Doug. (K.B.) 178. Halsbury, Vol. 22, pp. 60, 61, paras. 115, 116.

<sup>45</sup> *Thomas v. Atherton*, 10 Ch. D. 185; *Bury v. Allen*, 1 Coll. 604. Lindley, p. 454.

<sup>46</sup> *West v. Skip*, (1849) 1 Ves. Sen. 239.

<sup>47</sup> *Holroyd v. Griffiths*, (1856) 3 Drew. 428; *Lingen v. Simpson*, (1824) 1 Sim. & St. 600. Halsbury, Vol. 22, p. 61, para. 118.

**(f) Firm's right to be indemnified in case of wilful neglect :**

—The words “wilful neglect” mean that degree of neglect shown by abstention from an obvious duty, attended by a knowledge of the likely results of abstention. “Even if a loss sustained by a firm is imputable to the conduct of one partner more than to that of another, still, if the former acted *bona fide* with a view to the benefit of the firm, and without culpable negligence, the loss must be borne equally by all.”<sup>48</sup> But if a partner is guilty of a breach of his duty to the firm, and loss results therefrom, such loss must fall on him alone. As was said by the Court in *Bary v. Allen*,<sup>49</sup> ‘Suppose the case of an act of fraud, or culpable negligence, or wilful default by a partner during the partnership to the damage of its property or interests, in breach of his duty to the partnership whether at law compellable or not compellable, he is certainly in equity compellable to compensate or indemnify the partnership in this respect’.<sup>50</sup> So if one partner, without the authority of his co-partners, wilfully does that which is illegal, he must indemnify them from the consequences.<sup>51</sup>

**14.** Subject to contract between the partners, the property of the firm includes all property and rights and interests in property originally brought into the stock of the firm, or acquired, by purchase or otherwise, by or for the firm, or for the purposes and in the course of the business of the firm, and includes also the goodwill of the business.

Unless the contrary intention appears, property and rights and interests in property acquired with

<sup>48</sup> Lindley, p. 471.

<sup>49</sup> 1 Coll. 604.

<sup>50</sup> Lindley, p. 472; quoted in *Mahadev Vithu v. Ganoo*, 87 I.C. 735 : 1925 Bom. 324 : 27 Bom. L.R. 500, where the partner was not found to be guilty of fraud, culpable negligence or wilful default.

<sup>51</sup> See *Campbell v. Campbell*, 7 Cl. & Fin. 166.

money belonging to the firm are deemed to have been acquired for the firm.

**Old law :—**This section corresponds to sec. 253 (1) of the Indian Contract Act. Sec. 16 follows as a corollary.

**Property of the firm :—**The ordinary rule is that, unless a contrary intention appears by express agreement, or by the nature of the transaction, property bought with money belonging to the firm, is deemed to have been brought on account of the firm.<sup>52</sup> The money due on the life insurance policy of a partner effected in the course of the partnership business with the money of the partnership are assets of the partnership.<sup>53</sup> Lands and houses bought in the name of one partner and paid for by the firm or from the profits of the partnership business are *prima facie* partnership property,<sup>54</sup> unless it is proved that, from time to time, portions of partnership assets were by mutual agreement withdrawn from the partnership and converted into land or house to be owned by them as co-owners.<sup>55</sup> The fact that properties were purchased in the name of a firm, the purchase money being paid out of the partnership assets and considerable amounts were spent on constructing buildings thereon, is a strong indication that the properties were purchased and treated as partnership properties.<sup>56</sup> Property which has been used and treated as partnership property cannot be presumed to belong to one partner only, simply because he paid for it; for the presumption in such a case is rather that the property in

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<sup>52</sup> Bank of England Case, 3 D.F. & J. 645.

<sup>53</sup> *In re Adarji Mancherji Dalal*, 55 Bom. 795 : 133 I.C. 845 : 1931 B. 428.

<sup>54</sup> *Nerot v. Burnand*, 4 Russ. 247; *Wedderburn v. Wedderburn*, 22 Beav. 104; foll. in *Sudarsanam Maistri v. Narasimhulu Mistri*, 25 Mad. 149, 165.

<sup>55</sup> *Amir Chand v. Jawahir Mal*, 49 P.W.R. 1916; see also *Ghumanmal v. Papurbai*, 30 I.C. 24 (S.), where it has been held that lands purchased with partnership funds do not of necessity become partnership property—*Re Laurence, Ex parte M'Kenna*, Bank of England case, (1861) 3 De. G. F. & J. 645, C.A.—whether the partners hold them as co-owners or as partners depends upon the purpose for which they are purchased.

<sup>56</sup> *Ismail v. Tayaballi*, 1929 Sind 182.

question was his contribution to the common stock.<sup>57</sup> Payments made by different partners of a firm are presumed to have been made out of the funds of the firm in the absence of evidence to the contrary.<sup>58</sup>

The renewal of a lease by some of the partners enures to the benefit of all,<sup>59</sup> including the representatives of deceased partner,<sup>60</sup> and it is immaterial whether the lessors would have refused to renew to the partners who are not privy to the renewal.<sup>61</sup>

*Converting joint property to separate property and vice versa :—*

Partners may convert their joint property into the separate property of one or more of their number.<sup>62</sup> "If the personal representatives of a partner sell his share to the surviving partner or partners, relying simply on a covenant of indemnity against the partnership debts ; or if, on the true construction of the partnership articles, they lose their right against the surviving partner or partners to have the partnership assets applied to the payment of the partnership liabilities, the joint property becomes the separate property of the surviving partner or partners.<sup>63</sup> Conversely, the separate property of one partner may be converted into the joint property of the firm ;<sup>64</sup> but the mere fact that the profits of the partnership are made by means of the separate property of one partner does not convert that property into joint property."<sup>65</sup>

*What are not joint property :—*A contract on the part of a limited company to continue to employ a firm as its agents,

<sup>57</sup> *Ex parte Hare*, 1 Deac. 25; Lindley, p. 412.

<sup>58</sup> *Keshav v. Rayappa*, 12 B.H.C.A.C.J. 165.

<sup>59</sup> *Clegg v. Fishwick*, (1849) 1 Man. & G. 294.

<sup>60</sup> *Clements v. Hall*, (1858) 2 De G. & J. 173, C.A.

<sup>61</sup> *Featherstonhaugh v. Fenwick*, (1810) 17 Ves. 298.

<sup>62</sup> *Boulton v. Puller*, (1796) 1 Bos. & P. 539; Halsbury, Vol. 22, p. 57, para. 107.

<sup>63</sup> *Re Simpson*, (1874) 9 Ch. App. 572.

<sup>64</sup> *Re Bowers, Ex parte Owen*, (1851) 4 De G. & Sm. 351.

<sup>65</sup> *Burdon v. Barkus*, (1862) 4 De G.F. & J. 42, C.A.; *Fromont v. Coupland*, (1824) 2 Bing. 170; *Smith v. Watson*, (1824) 2 B. & C. 401. Halsbury, Vol. 22, p. 54, para. 102.

is not to be regarded as an asset of the firm in which the legal representative of a deceased partner of the firm would be entitled to participate.<sup>66</sup> Money or property given away does not continue to be the assets of the firm when it is given over to a third party.<sup>67</sup>

**Property acquired after dissolution** :—As regards property acquired after a dissolution, but before the affairs of a dissolved partnership have been wound up, such property is not necessarily to be considered as partnership property, even though the partner acquiring it has continued to carry on the business of the dissolved firm without the consent of his late partners.<sup>68</sup>

**Goodwill** :—It will be noticed that goodwill of the business has been specifically included among the property of the firm. It will, subject to the contract between the partners, be included automatically in all accounts for the determination of shares. This is in accordance with the Privy Council ruling in *Suleman v. Abdul Latif*<sup>68a</sup> and the Madras decision in *Ramakrishna v. Mathuswami*.<sup>69</sup> The goodwill of a business means every affirmative advantage, as contrasted with negative advantage that has been acquired in carrying on the business, whether connected with the premises of the business or its name or style and everything connected with or carrying with it the benefit of the business.<sup>70</sup>

## 15. Subject to contract between the partners, the property of the firm shall be held and used by the partners exclusively for the purposes of the business.

Application of the property of the firm.

<sup>66</sup> *Bachubai v. Shamji*, 9 Bom. 536, 555.

<sup>67</sup> *Solema Bibi v. Hafez Mahomed*, 54 Cal. 687 : 1927 Cal. 836 : 114 I.C. 833.

<sup>68</sup> *Nerot v. Burnand*, 4 Russ. 247; Lindley, p. 413.

<sup>68a</sup> 34 C.W.N. 737 : 1930 P.C. 185 : 1930 A.L.J. 868.

<sup>69</sup> 52 Mad. 672 : 1929 Mad. 456 : 121 I.C. 609 : 29 M.L.W. 560 : 36 M.L.J. 657.

<sup>70</sup> *Crutwell v. Lye*, 17 Ves. 335; *Trego v. Hunt*, (1896) A.C. 7;

### Employment of partnership property for personal gain :

—A partner has no right to employ the partnership property in a private speculation for his own benefit, and if he does so he is bound to account for the profits to his co-partners. (See sec. 16). Thus where a part-owner of a ship who was also its master traded on his own account and made profit during the time the ship was employed for common benefit, his co-partner was held to be entitled to share the profits even though they were earned solely by the employment of the master's own private capital.<sup>71</sup>

**Injunction** :—A partner may be restrained by injunction from using the assets of the firm in a separate business carried on for a partner's own benefit ;<sup>71</sup> and from using the partnership assets for the renewal of a lease against the will of his partner ;<sup>72</sup> from using or granting licences to use a patent belonging to the partnership without the consent of the other partners.<sup>73</sup>

Personal profits earned by partners. **16. Subject to contract between the partners,—**

- (a) if a partner derives any profit for himself from any transaction of the firm, or from the use of the property or business connection of the firm or the firm name, he shall account for that profit and pay it to the firm ;
- (b) if a partner carries on any business of the same nature as and competing with that of the firm, he shall account for and pay to the firm all profits made by him in that business.

*Churton v. Douglas*, 28 L.J. Ch. 84; *Haji Abdul Latif v. Suleman*, 1929 Sind 85 : 110 I.C. 639 : 23 S.L.R. 471.

<sup>71</sup> *Gardner v. McCutcheon*, 4 Beav. 534.

<sup>72</sup> *Clements v. Norris*, (1878) 8 Ch. D. 129 C.A.

<sup>73</sup> *Bluchford v. Hawkins*, (1823) 1 L.J. (O.S.) (C.H.) 141. See *Halsbury*, Vol. 22, p. 81, para. 158.

**Old law** :—Clauses (a) and (b) of this section correspond to sections 258 and 259 of the Indian Contract Act.

**Personal profits earned by partners** :—This section is based upon the principle that good faith ought to regulate the conduct of the partners *inter se*, and so, if in breach of that duty, any partner derives some secret benefit by reason of his position as such, he is honour bound to account for such profits to his co-partners just in the same way as secret profits made by an agent enure to the benefit of the principal. (See secs. 215 and 216 of the Indian Contract Act). The reason is obvious. "He is bound, in all transactions affecting the partnership, to do his best for the common body, and to share with his co-partners any benefit which he may have been able to obtain from other people, and in which the firm is in honour and conscience entitled to participate."<sup>74</sup>

(a) **Accounting for personal profits** :—Thus a partner who is employed to purchase goods for the firm cannot supply the firm at market-price with goods which he had bought at a lower price, and if he does so he must account for the profits to the firm.<sup>75</sup> Similarly, a partner who renews a lease in his own name is a trustee of it for the firm,<sup>76</sup> that is, the renewing partner is a trustee for himself and his partners, his *cestuis que trustent*, and the position is not improved by the fact that the lessee gives notice of dissolution and of his intention to renew the old lease for his own benefit.<sup>77</sup>

(b) **Rival business by a partner** :—A partner cannot, either openly or secretly, lawfully carry on for his own benefit, any business in rivalry with the firm to which he belongs. "A partner is not allowed, in transacting the partnership affairs, to carry on for his own sole benefit any separate trade or business which, were it not for his connection with the partner-

<sup>74</sup> Lindley, p. 391.

<sup>75</sup> *Bentley v. Craven*, 18 Beav. 75.

<sup>76</sup> Woodfall's Landlord and Tenant, 14th Ed., p. 386; *Clegg v. Edmondson*, 8 De G.M. & G. 787, ref. to in *Ragoonathdas v. Morarji Jutha*, 16 Bom. 568, 574; *Featherstonhaugh v. Fenwick*, 17 Ves. 298.

<sup>77</sup> *Clegg v. Edmondson*, 8 De G.M. & G. 787.



ship, he would not have been in a position to carry on. Bound to do his best for the firm, he is not at liberty to labour for himself to their detriment; and if his connection with the firm enables him to acquire gain, he cannot appropriate that gain to himself on the pretence that it arose from a separate transaction with which the firm had nothing to do."<sup>78</sup>

**Where the rule does not apply :—**The rule is not applicable to a really different business carried on by a partner of a firm though the same knowledge and information may be used in both.<sup>79</sup> Further, unless expressly restricted by agreement a partner may carry on another business privately so long as it does not compete with and is not connected with the business of the firm and so long as he does not represent it to be the business of the firm. He is not bound to account for the profits of non-competing business, even though he may be enabled to push the private trade better than he would otherwise be by reason of his connection with the firm.<sup>80</sup> So a partner may derive private benefit in matters entirely outside the scope of, and not in competition with, the business by the use of information acquired in the partnership business.<sup>81</sup>

**Injunction :—**If one of two rival partners carries on a rival business of the partnership in competition with and to the prejudice of the other, he can be restrained by an injunction from carrying it on.<sup>82</sup> "A partner may be restrained by injunction from entering into a new partnership with others for carrying on a business of the same nature and character as of the old partnership before the expiration of the term of the old partnership, from publishing notices of dissolution, and from using the firm name of the old partnership in his new business;<sup>83</sup> and generally from carrying on a business on his own account in

<sup>78</sup> Lindley, p. 399; *Russel v. Austwick*, 1 Sim. 52; *Loek v. Lynam*, 4 Ir. Ch. 188.

<sup>79</sup> *Pullin v. Mahendra*, 1921 Cal. 722 : 67 I.C. 10 : 34 C.L.J. 405.

<sup>80</sup> *Mohammed Kamli v. Heddyetulla*, 1926 Cal. 380 : 90 I.C. 492.

<sup>81</sup> *Aas v. Benham*, (1891) 2 Ch. 244, C.A..

<sup>82</sup> *Mumtas v. Kasim Ali*, 11 A.L.J. 423.

<sup>83</sup> *England v. Curling*, (1884) 8 Beav. 129.

the firm name,<sup>84</sup> or with partnership assets;<sup>85</sup> from using the assets of the firm in a separate business carried on for his own benefit.”<sup>86</sup>

# 17. Subject to contract between the partners,—

- (a) where a change occurs in the constitution of a firm, the mutual rights and duties of the partners in the reconstituted firm

Rights and duties of partners after a change in the firm,

remain the same as they were immediately before the change, as far as may be;

- (b) where a firm constituted for a fixed term continues to carry on business after the expiry of that

after the expiry of the term of the firm, and

term, the mutual rights and duties of the partners remain the same as they were before the expiry, so far as they may be consistent with the incidents of partnership at will; and

- (c) where a firm constituted to carry out one or more adventures or undertakings carries out other adventures or undertakings, the mutual rights and duties of the partners in respect of the other adventures or undertakings are

where additional undertakings are carried out.

<sup>84</sup> *Aas v. Banham*, (1891) 2 Ch. 244; C.K.

<sup>85</sup> *Turner v. Major*, (1862) 3 Giff. 442.

<sup>86</sup> *Gardner v. M'Cutcheon*, (1842) 4 Beav. 534. Halsbury, Vol. 22, p. 80, para. 158.

the same as those in respect of the original adventures or undertakings.

**Rights and duties after change or expiry of term :—**

This section defines certain general rules for the determination of the rights and duties of the partners after the happening of events which would otherwise leave those rights and duties undetermined.<sup>87</sup> But if a partner of a firm retires after the firm has entered into a contract and a new partner joins the firm, the newly constituted firm is different from the old firm and cannot institute a suit on the contract entered into by the latter except when the new firm took over by arrangement all the liabilities and outstandings of the old firm.<sup>88</sup>

(b) This is a general rule of construction where there is no contract defining the rights and obligations of the partners. This rule would apply even if, by agreement, the provisions are made applicable during the term of the partnership. Thus an agreement between two persons for a partnership for a certain term giving the survivor the power to take the share of the deceased for a fixed amount in case of his death within the stipulated term was held to be binding when the partners continued in partnership without a fresh agreement after the expiry of the stipulated term.<sup>89</sup>

## CHAPTER IV.

### RELATIONS OF PARTNERS TO THIRD PARTIES.

18. Subject to the provisions of this Act, a partner is the agent of the firm for the purposes of the business of the firm.

Partner to be agent of the firm.

<sup>87</sup> Notes on clauses.

<sup>88</sup> *Firm of Manghoomal v. Firm Aratmal*, 1922 Sind 13 : 65 I.C. 26 : 15 S.L.R. 152.

<sup>89</sup> *Essex v. Essex*, 20 Beav. 442.

**Old law :—**This section and the next section correspond to sec. 251 of the Indian Contract Act but the Exception has been the subject of section 20.

**Why and when acts of a partner bind the firm :—**Chapter IV is mostly taken up with the statement and development of the principle that each partner is the agent of the firm. 'As between the partners and the outside world (whatever may be their private arrangement between themselves), each partner is the unlimited agent of every other in every matter connected with the partnership business, or which he represents as partnership business, and not being in its nature beyond the scope of the partnership.'<sup>90</sup> 'Partners may stipulate among themselves that some one of them only shall enter into particular contracts, or that as to certain of their contracts none shall be liable except those by whom they are actually made ; but with such private arrangements third persons dealing with the firm without notice have no concern'.<sup>90a</sup>

**19. (1)** Subject to the provisions of section 22, the act of a partner which is done  
Implied authority of partner as agent of the firm.
 to carry on, in the usual way, business of the kind carried on by the firm, binds the firm.

The authority of a partner to bind the firm conferred by this section is called his "implied authority".

(2) In the absence of any usage or custom of trade to the contrary, the implied authority of a partner does not empower him to—

(a) submit a dispute relating to the business of the firm to arbitration,

(b) open a banking account on behalf of the firm in his own name,

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<sup>90</sup> Per Lord Westbury in *Ex parte Darlington &c. Banking Co., In re Riches*, (1864) 4 De G.J. & S. 581, 585.

<sup>90a</sup> Lord Cranworth, *Cox v. Hickman*, (1860) 10 East 264.

- (c) compromise or relinquish any claim or portion of a claim by the firm,
- (d) withdraw a suit or proceeding filed on behalf of the firm,
- (e) admit any liability in a suit or proceeding against the firm,
- (f) acquire immoveable property on behalf of the firm,
- (g) transfer immoveable property belonging to the firm, or
- (h) enter into partnership on behalf of the firm.

**Implied authority of a partner :—**This section contains the next important principle defining the general extent of a partner's agency, namely, that an act of a partner which is done to carry on business of the kind carried on by the firm, *and* is done in the usual way in such a business binds the firm.<sup>91</sup> It follows from this that recourse is to be had to this section where no actual authority can be proved nor there is anything to show ratification by the firm. In cases coming within the purview of the section the liability of the firm arises irrespective of any limitation of authority of a partner to bind it only if the other conditions are fulfilled, but, from the very nature of the thing, it is presupposed that the person seeking to make the firm liable was not aware of the limitation of authority. On the other hand, even though the conditions stated in the section are not satisfied, the liability of the firm would arise all the same if actual authority or ratification can be proved. If a partner exceeds his authority the other partners may be bound by ratification,<sup>92</sup> or by acquiescence.<sup>93</sup>

**In the usual way :—**"What is done in carrying on the partnership business in the usual way in which businesses of a like kind are carried on, is made the test of authority when

<sup>91</sup> Notes on clauses.

<sup>92</sup> *Willis v. Dyson*, (1816) 1 Stark. 164.

<sup>93</sup> *Cragg v. Ford*, (1842) 1 Y. & C. Ch. Cas. 280, 285.

no actual authority or ratification can be proved. This probably means the same thing as saying that what is necessary to carry on the partnership business in the usual way is the test of a partner's implied authority to bind the firm."<sup>94</sup> But the rule of the English law that "a power to do what is usual does not include a power to do what is unusual, however urgent"<sup>95</sup> has been modified by the enactment of section 21 of the present Act.

Hence a partner's act binds the firm only if the other partners have in fact authorised or ratified it or if it is done in the course of carrying on the partnership business in the usual way,<sup>96</sup> i.e., in accordance with the ordinary practice of the partnership.<sup>97</sup> 'Every partner is in contemplation of law the general and accredited agent of the partnership, or as it is sometimes expressed, each partner is *praepositus negotiis societatis*, and may consequently bind all the other partners by his acts in all matters which are within the scope and objects of the partnership. Hence, if the partnership be of a general commercial nature, he may pledge or sell the partnership property; he may buy goods on account of the partnership: he may borrow money, contract debts, and pay debts on account of the partnership; he may draw, make, sign, indorse, accept, transfer, negotiate, and procure to be discounted promissory notes, bills of exchange, cheques and other negotiable paper in the name and on account of the partnership'.<sup>98</sup> Even a sleeping partner is bound by contracts made by the ostensible partners in the ordinary course of the partnership business,<sup>99</sup> though the liability should be consonant with

<sup>94</sup> Lindley, p. 179.

<sup>95</sup> Lindley, pp. 179, 180.

<sup>96</sup> *Sobhmal v. Pohumal*, 13 I.C. 225 (S.).

<sup>97</sup> *Jagabhai v. Rustomji*, 9 Bom. 311, 317; but the question of necessity is not essential under this section though it may be so under section 21.

<sup>98</sup> Story on Agency, 124; adopted in *Bank of Australasia v. Brethell*, (1847) 6 Moo. P.C. at p. 193. See *Ram v. Kasem*, 28 C.W.N. 824.

<sup>99</sup> *Beckham v. Drake*, (1841) 9 M. & W. 79.

the principles of justice, equity and good conscience.<sup>1</sup> Thus in a business of catching elephants a partner is liable on a contract of indemnity entered into by other partners for the possible loss of an elephant taken as a loan for the purpose of the business.<sup>2</sup>

But an agreement by one partner would not be binding on the firm when the agreement was out of the scope of the partnership business and without authority of the partners,<sup>3</sup> e.g., an agreement to carry parcels free of charge,<sup>4</sup> or in a mercantile firm, executing deeds on behalf of the firm<sup>5</sup> or the giving of guarantees by a member.<sup>6</sup>

**Authority to borrow :—**Each partner is the agent of his co-partners for the purpose of contracting debts and obligations in the usual course of the partnership business.<sup>7</sup> In a trading firm any partner has an implied authority to borrow money for the purpose of the business on the credit of the firm,<sup>8</sup> and in such cases a partner has an implied authority to draw, accept, and endorse bills of exchange and other negotiable instruments on behalf of the firm.<sup>9</sup>

Even a dormant partner in a mercantile or ordinary trading partnership is liable upon every bill drawn by a partner in the recognised trading business of the firm, although his name do not appear on the face of the instrument<sup>10</sup> but the liability extends only to sums borrowed by the active

<sup>1</sup> *Nundeesput v. Urquhart*, 9 W.R. 355.

<sup>2</sup> *Mathuranath v. Bageswari*, 46 C.L.J. 362 : 1928 Cal. 57 : 106 I.C. 516.

<sup>3</sup> *M. Z. Martin v. F. W. Baker*, 15 B.L.R. 372.

<sup>4</sup> *Bignold v. Waterhouse*, (1813) 1 M. & S. 255.

<sup>5</sup> *Harrison v. Jackson*, (1797) 7 Term Rep. 207; *Merchant v. Morton Dawn & Co.*, (1901) 1 K.B. 829.

<sup>6</sup> *Duncan v. Lowndes*, (1813) 3 Camp. 478; *Hasleham v. Young*, (1844) 5 Q.B. 833; *Brettel v. Williams*, (1849) 4 Exch. 623.

<sup>7</sup> *Chundee Churn v. Eduljee Cowasjee*, 8 Cal. 678, 684.

<sup>8</sup> *Saremal Puranchand v. Kapurchand*, 48 Bom. 176 : 77 I.C. 548 : 1924 Bom. 260 : 25 Bom. L.R. 1093.

<sup>9</sup> *Harrison v. Jackson*, (1797) 7 Term Rep. 207; *Williamson v. Johnson*, (1813) 1 B. & C. 146; *Motilal v. Unao Commercial Bank*, 35 C.W.N. 1 : 1930 P.C. 238.

<sup>10</sup> *Bunarsee v. Gholam Hossein*, 13 W.R. 29, 30, P.C.

partner in his capacity as a member of the firm.<sup>11</sup> A trading business is one which involves the purchase of and sale of goods, but it is wrong to say that every business which necessarily involves the expenditure of money for the purpose of buying goods which the business requires is a trading business.<sup>12</sup> Where a partner of a trading firm borrows there is no duty cast on the person advancing the money to make any further enquiries, and the other partners are liable though the borrowing partner misappropriates the money<sup>13</sup> and the transaction is unauthorised if the creditor has no notice of the fraud.<sup>14</sup> But the position would be otherwise if he has notice of suspicious circumstances which ought to have put him on inquiry.<sup>15</sup> In the case of a partnership not of a mercantile character there is no implied authority in one partner to bind the others by negotiable instruments. He must have express authority.<sup>16</sup>

**Liability of partners on documents executed by one partner** :—Subject to the provisions of section 22, unless there is any particular restriction, express or implied, in respect of any liability to be incurred by one partner with regard to a bill or pro. note which may be executed by one partner for the purposes of the partnership, and such restriction is known to the creditor, (see sec. 20) the other partner cannot escape liability for the partnership debt.<sup>17</sup>

<sup>11</sup> *Ram Chandra v. Kasem Khan*, 28 C.W.N. 824.

<sup>12</sup> *Higgins v. Beuchamp*, (1914) 3 K.B. 1192, where it has been held that a partnership with the object of running a cinematograph entertainment is not a trading partnership. The term 'trading firm' has been likewise defined in *Saremal Purchand v. Kapurchand*, 48 Bom. 176 : 77 I.C. 548 : 1924 Bom. 260 : 25 Bom. L.R. 1093.

<sup>13</sup> *Saremal Puranchand v. Kapurchand*, 48 Bom. 176 : 77 I.C. 548 : 1924 Bom. 260 : 25 Bom. L.R. 1093.

<sup>14</sup> *Ibid.*, *Wiseman v. Easton*, (1863) 8 L.T. 637; *Hood v. Aston*, (1826) 1 Russ. 412.

<sup>15</sup> See *Okell v. Easton & Okell*, (1874) 31 L.T. 330; *Lloyd v. Freshfield*, (1826) 2 C. & P. 325; *Reid v. Hollinshed*, (1825) 7 Dow. & Ry. (K.B.) 444.

<sup>16</sup> *Maung Pho Mya v. Dawood & Co.*, 66 I.C. 584 : 11 L.B.R. 137 : 1921 L.B. 44.

<sup>17</sup> *M. R. P. S. Shanmuganatha v. K. Srinivasa*, 40 Mad. 727.



Even a minor partner may become a member in a partnership and in that capacity can bind his co-partners by executing a pro. note on behalf of the partnership.<sup>18</sup> But it is important to note that in partnerships of a limited character, where there is a document of debt which on its face binds only one partner, other partners can be made liable only if it is shown that the obligation incurred by one partner was within the operations natural to the partnership and for the partnership.<sup>19</sup> So a bond executed by the managing partner for the purpose of the firm and within the scope of his authority is binding on the remaining partners.<sup>20</sup> The principle that only the maker of a pro. note can be held liable thereunder is not applicable in a case where an independent contract is alleged and, therefore, the promisee can be allowed to adduce evidence as to the independent contract. If the plaintiff can show that there was a contract with the partnership and the pro. note executed by a partner in his own name was merely evidence of such contract, all the partners would appear to be liable.<sup>21</sup>

**Presumption** :—The authority of a partner to incur debts or pay them fully or partly may be presumed from the surrounding circumstances.<sup>22</sup> The authority of a partner to borrow is presumed in every business where it is found necessary.<sup>23</sup> But a bill given for a partner's private debt raises a presumption that he had no authority to sign the name of the firm for that purpose.<sup>24</sup>

**Reimbursement** :—On the principle of the section, co-partners are liable to re-imburse another co-partner for moneys

<sup>18</sup> *Maung Aung Gyaw v. Haji Dada Shariff & Co.*, 42 I.C. 98.

<sup>19</sup> *Karamali Abdulla v. Vora Karimji*, 39 Bom. 261 : 19 C.W.N. 337, P.C.

<sup>20</sup> *Hakim Syed Ahmed v. Babukurneedan*, 24 W.R. 60, 61; see also *Jugjeewun v. Ram Das*, 6 W.R. 10, P.C.

<sup>21</sup> *Pynda Venkatáchalapati v. Pynda Ramakrishnayya*, 1930 Mad. 168 : 123 I.C. 358.

<sup>22</sup> *Rala Singh v. Bhagwan*, 2 Rang. 367 : 1925 Rang. 30 : 84 I.C. 391.

<sup>23</sup> *Mt. Dhanbai v. Dalbai*, 1926 Sind 291 : 96 I.C. 927 : 21 S.L.R. 267.

<sup>24</sup> *Frankland v. M'Gusty*, (1830) 1 Knapp. 274 P.C.; *Leverson v. Lane*, (1862) 13 C.B.N.S. 278; *Ridley v. Taylor*, (1810) 13 East. 175.

spent from his pocket within the legitimate scope of the partnership.<sup>25</sup>

**Power to mortgage** :—Power to borrow is incidental to power to trade and power to pledge the business assets is incidental to power to borrow,<sup>26</sup> and so the managing partner may borrow and pledge partnership assets.<sup>27</sup> According to English rule one partner can effect an equitable mortgage of immoveable property belonging to the partnership but not a legal mortgage unless with the express authority given by all the partners by deed, and there is no reason why, following the English rule, he should not effect a legal mortgage as well.<sup>28</sup> The observation of Straight, J.,<sup>29</sup> that in India the presumption is against the existence of such a power was made in the case of a partnership between Englishmen and the case was<sup>not</sup> followed in the above Madras case especially as applied to natives in India. It has been held by the Judicial Committee that a mortgage by one of the partners of partnership property for the benefit of the firm is binding on a member of the firm although he did not execute it.<sup>30</sup> So the managing partner has authority to execute mortgage of partnership property in order to raise money to carry on the business.<sup>31</sup> Similarly, a mortgage by the managing member of a joint Hindu trading family for the purpose of the business is binding on all partners.<sup>32</sup> Mortgage of the assets of a firm by one member with the consent and informal co-operation of the undisclosed partner, is valid and binding on the latter as principal.<sup>33</sup> But a partner cannot give a valid charge upon

<sup>25</sup> *Harrison v. Delhi and London Bank*, 4 All. 437, 461.

<sup>26</sup> *Great Auction Estate and Monetary Co. v. Smith*, (1891) 3 Ch. 432.

<sup>27</sup> *Asan v. Somasundaram*, 31 Mad. 206.

<sup>28</sup> *Ibid.*, p. 208.

<sup>29</sup> *Harrison v. Delhi & London Bank*, 4 All. 437, 459.

<sup>30</sup> *Juggeewandas v. Ramdas*, 2 M.I.A. 487, P.C.

<sup>31</sup> *Jaffer Ali v. Standard Bank of South Africa*, 1928 P.C. 135 : 107 I.C. 453 : 47 C.L.J. 292 : 30 Bom. L.R. 762.

<sup>32</sup> *Bemola v. Mohun Dossee*, 5 Cal. 792.

<sup>33</sup> *Jethabhai Kevalbhai v. Chotalal Chunilal*, 34 Bom. 209.

partnership property (which he holds as trustee) for his private debt to a lender who knows the property to belong to the firm.<sup>34</sup>

Objection under this score does not arise where there is no agreement between the parties restricting the partner from executing a mortgage.<sup>35</sup>

**Estoppel** :—Hence to put the matter in a negative form, one partner cannot create a charge on partnership property, nor borrow money for the purpose of the partnership so as to make the other partners liable except under their authority, express or implied. But when they allow him to conduct the business of the partnership in such a manner as to make it appear that, to all intents and purposes, the whole control and management was vested in him, they would be liable to make good all advances that were made for the necessary purposes of the firm.<sup>36</sup>

**Acknowledgment** :—A partner has authority on behalf of himself and other partners to apply the assets in making payments on account of the outstanding debts which would have the effect of preventing them from being barred by limitation. On the same principle, he would have authority to pass acknowledgments which would have the effect of staying off the claims of creditors and would have on the other hand saved the claims from being barred by limitation.<sup>37</sup> But it must be shown that the acknowledgment was an act necessary for or usually done in carrying on the business of the partnership.<sup>38</sup> Mere writing or signing an acknowledgment by one partner does not necessarily of itself bind his co-partner, unless it can be shown that he had otherwise power to bind that partner for the purpose of making such acknowledgment and in effect purported so to bind him.<sup>39</sup> It should be noted however that any person having a general authority to pay the amount of a claim must necessarily

<sup>34</sup> *Wilkinson v. Eykyn*, (1866) 14 W.R. 470 (Eng.).

<sup>35</sup> *Asan v. Somasundaram*, 31 Mad. 206, 210.

<sup>36</sup> *Harrison v. The Delhi and London Bank*, 4 All. 437.

<sup>37</sup> *Abdullah v. Ranchodlal*, 19 Bom. L.R. 86; *Dalsukhram v. Kalidas*,

26 Bom. 42.

<sup>38</sup> *Dalsukhram v. Kalidas*, 26 Bom. 42, 49.

<sup>39</sup> *Gadu v. Parsotam*, 10 All. 418.

have also authority to make part-payments to prevent time from becoming a bar to it.<sup>40</sup> Hence the authority that has to be shown may be express or implied, and in a going mercantile concern such agency to strike balances in the firm account<sup>41</sup> is to be presumed as an ordinary rule.<sup>42</sup> In respect of a partnership debt a partner's authority thus extends to making an acknowledgment by part-payment so as to bind his co-partners.<sup>43</sup>

But the Madras High Court in its earlier cases held that a part-payment by one partner of a going mercantile firm will not save the operation of limitation against the other partners, in the absence of evidence to show that, in the course of business, the partner who made the payment had authority to do so on behalf of the firm.<sup>44</sup> And the mere fact that one of the partners of a going concern is in charge of a branch of such concern cannot lead to the inference that such partner has authority to bind the firm by an acknowledgment when pressed for payment.<sup>45</sup> Following the above cases it was held that evidence of authority from the other partners is necessary and cannot be presumed.<sup>46</sup> But the Court, at the same time, observed that the above decisions require to be reconsidered in the light of the rulings of the English and other Indian High Courts. The point again arose and so far as those cases may be taken to mean that direct evidence of specific authority is necessary they have been held not to be good law by a Full Bench which held that direct evidence is not necessary but the authority may be inferred from surrounding circumstances such as the position of the other co-contractors or partners.<sup>47</sup>

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<sup>40</sup> *Rala Singh v. Bhagwan Singh*, 2 Rang. 367 : 1925 Rang. 30 : 84 I.C. 391.

<sup>41</sup> *Ram Rattan v. Sobha Ram*, 1929 Lah. 512.

<sup>42</sup> *Ibid.*, *Premji v. Dossa Doongersey*, 10 Bom. 358.

<sup>43</sup> *Mahadeva v. Rama Krishna*, 1926 Mad. 114 : 90 I.C. 653 : 1925 M.W.N. 707 : 23 M.L.W. 199 : 50 M.L.J. 67.

<sup>44</sup> *Valasubramania v. S. V. R. R. M. Ramanathan*, 32 Mad. 421.

<sup>45</sup> *Shathk Mohideen v. Official Assignee, Madras*, 35 Mad. 142.

<sup>46</sup> *K. R. V. Firm v. Seetharamaswami*, 37 Mad. 146.

<sup>47</sup> *Pandiri Veeranna v. Veerabhadraswami*, 41 Mad. 427 F.B. : 34 M.L.J. 373 : 23 M.L.T. 261 : (1918) M.W.N. 285 : 7 L.W. 552.

There is thus no practical divergence of judicial opinion now with respect to the authority of a partner to acknowledge a partnership debt.<sup>48</sup>

*Settling accounts* :—One partner is bound by the act of another partner in settling an account between the partnership and a third person.<sup>49</sup>

*Lease* :—One partner has no implied authority to take a lease of a house which would be binding on the firm though the lease is taken for partnership purposes.<sup>50</sup> In a Bombay case it was held that where one partner takes a lease of premises in his own name, though on behalf of the partnership, and with the assent of his partners, the latter are not liable to be sued by the lessor for the rent reserved by the lease. The ground of the decision was that a lease is not a mere contract but a conveyance and effects a transfer of property, and so far as the lessor is concerned, it must be deemed to be only on behalf of the person to whom the demise is made.<sup>51</sup> But this view has been dissented from in a Madras case,<sup>52</sup> and the *ratio decidendi* of the Bombay case was met by the case of mortgage as to which there is no doubt that, although executed by one person, it may be binding upon the partners or others who have authorised the act. But the Madras case does not seem to be a case of implied authority because in that case it appeared that by an agreement between the defendants any one partner was empowered to take a lease and execute any necessary document, such document being taken to be binding upon all the partners as if executed by them.

It may be noted here that in the Bill as originally drafted lease was specifically included in sub-section (2) but that clause was subsequently deleted, leaving the Courts free to decide particular cases on their particular facts.

<sup>48</sup> See *Mahadeva v. Ramakrishna*, 1926 Mad. 114 : 90 I.C. 653 : 1925 M.W.N. 707 : 23 M.L.W. 199 : 50 M.L.J. 67.

<sup>49</sup> *Manju v. Devamma*, 26 Mad. 186.

<sup>50</sup> *Sharp v. Milligan*, 22 Beav. 606.

<sup>51</sup> *Ragoonathdas v. Morarji*, 16 Bom. 568, 574, 575.

<sup>52</sup> *Chinnaramanuja v. Padmanabha*, 19 Mad. 471.

**No presumption of agency in case of dissolution :—**

The principle of agency does not exist in the case of a partnership which has ceased to be a going concern. After dissolution by death of a partner, another partner cannot bind the representative of the deceased by an acknowledgment of a debt without special authority.<sup>53</sup> When a firm is being wound up one partner cannot borrow money and mortgage the firm's assets except perhaps in the case of necessity, and cannot give an acknowledgment of a subsisting debt which would bind the firm.<sup>54</sup> After a partnership has been dissolved and accounts settled any balance struck by a partner is without authority and consideration. It does not create any liability on the firm.<sup>55</sup> However, the presumption continues to operate in favour of the firm's creditor so long as no notice of dissolution of partnership is given.<sup>56</sup> Similarly, an acknowledgment made in the usual course of and essential to the business by one of the partners in the absence of notice of dissolution to the creditor by the resigning partner is binding on the resigning partner.<sup>57</sup>

In English law a surviving partner can give a valid security on the partnership assets for a debt incurred before the death of his partner,<sup>58</sup> and a partner has authority to pledge partnership property for partnership purposes after, as well as before, dissolution, in the course of winding up the business.<sup>59</sup>

**Onus.**—Where a person wants to escape liability on a document on the ground that he ceased to be a partner long before the document was executed, he must prove unequivocally

<sup>53</sup> *Sheonarañ v. Babu Lal*, 1925 Nag. 268 : 85 I.C. 775.

<sup>54</sup> *Malayandi v. Narayan*, 36 I.C. 225 (Bur.).

<sup>55</sup> *Bhanun v. Jiwanda*, 1926 Lah. 522 : 95 I.C. 88.

<sup>56</sup> *Dalsukhram v. Kalidas*, 26 Bom. 42, 45, 49.

<sup>57</sup> *Bengal National Bank v. Jatindra Nath*, 56 Cal. 556 : 1929 Cal. 714 :

33 C.W.N. 412.

<sup>58</sup> *Re Clough, Bradford Com. Banking Co. v. Cure*, (1885) 31 Ch. D.

324.

<sup>59</sup> *Butchart v. Dresser*, (1853) 4 De G. M. & G. 542, C.A.; *Brown v. Kidger*, (1858) 3 H. & N. 853; *Re Litherland, Ex parte Howden*, (1842) 2 Mont. D. & De. G. 574; *Re Bourne, Bourne v. Bourne*, (1906) 2 Ch. 427; *Halsbury*, Vol. 22, p. 27, para. 47.

that the partnership, which according to the terms of the document was still in existence, had determined by agreement between the parties, and if the documents on which he relies to prove that agreement can with equal justification be read as having two different meanings then he has failed to satisfy the onus which lay on him.<sup>59a</sup>

**Sub-sec. (2): Limitations of implied authority :—**This sub-section has no statutory precedent, but has been extracted from section 2 of Chapter I of Book II of Lindley's work, which contains an exhaustive account of the subject of the extent and limitations of a partner's implied authority. The selection has been made with regard to Indian conditions.

The members of the committee who drafted the Bill were equally divided on the value and soundness of this sub-section. Those who would retain it argued as follows:—"The delimitation of a partner's implied authority in sub-clause (1) is not precise, but as this subject covers such a wide field of human activity, it would be an impossible task to provide for all the necessary elements in any precise definition. Sub-clause (1) is, admittedly, a provision of the kind which must lead to much judicial exposition. But certain rules have already been established in the English Courts, and the adoption of such of them as seem to be suited to Indian conditions must be a distinct gain; for, to the extent of their inclusion, they will be known in business circle and will not have to be established by the slow and expensive method of litigation. Apart altogether from the historical bases of the propositions contained in this sub-clause, or their validity as general propositions of English law, we who favour their retention regard them as useful guides in India, in the absence of a contract to the contrary. They should be particularly valuable in Courts which do not possess an extensive library."

On the other hand, those who would delete the sub-clause argued as follows:—"The sub-clause assumes that in the contemplation of the legislature the exercise of these powers is not a usual method of carrying on business by a partner or partners. We do not think that there is any warrant for such a general assumption. A close examination of the decided cases cited in Lindley shows that, in regard to some of the points, they are based upon the historical accidents of English law, and, in regard to other points, the sub-clause does not accurately set out the

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<sup>59a</sup> *P. S. R. Charry v. Pohoomal*, 50 Bom. 665, 672 : 99 I.C. 495 : 1926 Bom. 585 : 28 Bom. L.R. 1275.

effect of the English decision, inasmuch as the English decisions themselves do not purport to lay down any absolute rule of law without reference to the usage obtaining in the particular trade or business. The rule as to arbitration stated in Lindley on page 186 rests on the decision in *Stead v. Salt*. The discussion of the subject in Story in section 114 points to the conclusion that to some extent the rule is based, not upon any intrinsic principle of partnership law, but upon the ancient reason that it is not right to remove any matter from the cognisance of the established Courts of Justice. These Courts are best equipped to investigate the merits of a case by proper legal proof and testimony; whereas the equipment of arbitrators is slender. From the note in Story under section 114 we gather that some of the American Courts have refused to lay down any such general restriction and have distinguished the early English cases as resting on special grounds. From Comyn's Digest we gather that the prohibition was based on the necessity for a reference to arbitration being under seal under the early English law. It may be further observed that an arbitration clause is usual in the case of contracts for the sale of goods, and to deny a partner the power to refer to arbitration would really be to deprive him of the power to carry on the business in the usual way. Clause (c) deals with compromising or relinquishing any claim or portion of a claim. Story in section 115 states it as an undoubted proposition of law that a partner may release or even compound or compromise a partnership debt. In 3 C.B. 742 at page 745 Maule J. states the law to be that a partner may release debts because he has authority to receive them. The decision in 11 M. & W., page 84, also lends support to the view that a partner can release a claim. In fact the Solicitor General who contested the release in that case conceded that it is clear that if two partners commence an action one may release the subject matter of it, and that unless there be fraud to induce the Court to interfere and set aside the release, it is binding upon the other plaintiff and operates as a bar to the action. The cases cited in Lindley at page 195 in support of the proposition that a partner has no authority to compromise do not seem to bear out the proposition in the wide terms stated in the text. They are all cases where a partner sought to set off and adjust a private debt due by him in discharge of a debt due to the firm. Clause (f) which denies authority to a partner to take a lease on behalf of a firm of immoveable property rests on the case in 22 Beav. 606. The decision, however, is an authority only for the proposition that in the case of partnership at will a partner cannot bind the firm by taking a lease for twenty-one years. (This clause has been subsequently deleted and in its place a clause denying authority to a partner to acquire immoveable property has been substituted). Clause (g) as to transfer of immoveable property is taken from Lindley, pages 196 and 200. The rule in England is based upon



the accidents of English law of real property as to conveyance of legal estate by deed. It is settled law in England that a partner can effect a mortgage by deposit of title deeds. The clause as it stands would prohibit such a mortgage because a mortgage by deposit of title deeds would be a transfer of immoveable property, by the operation of section 58 of the Transfer of Property Act, 1882. A mortgage by deposit of title deeds is a normal method of raising money for a firm in the Presidency towns, and there is no reason why the Legislature should commit itself to the principle that in the absence of a contract to the contrary it is not a usual method of carrying on business. Similarly the obtaining of a lease may be ancillary and necessary to the carrying on of the business of a firm. In the circumstances, we would prefer that the whole clause should be deleted and that it should be left to the Courts to decide whether in any case the exercise of the particular power will amount to carrying on the business in the usual way. It is not right in principle that the Legislature should categorically lay down that particular acts are not in the usual way of business and thereby crystallise the discretion of Courts, because from the very nature of things, such a list cannot be exhaustive." These objections have been met in part by making the clauses applicable "in the absence of any usage or custom of trade to the contrary."

(a) **Arbitration** :—The English authorities seem to be unanimous in holding that one partner cannot, without special authority, bind his firm by submission to arbitration,<sup>60</sup> and this rule has been followed or referred to in a number of Indian cases.<sup>61</sup> But it should be noted that the rule is based upon the historical accidents of English law and not upon any intrinsic principle of partnership law. Further, the English decisions themselves do not purport to lay down any absolute rule of law without reference to the usage obtaining in the particular trade or business, and some of the American Courts have refused to lay down any such general restriction and have

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<sup>60</sup> *Stead v. Salt*, (1825) 3 Bing. 101; *Adams v. Bankart*, (1835) 1 C.M. & R. 681; *Hambige v. De la Crouze*, (1846) 3 C.B. 742.

<sup>61</sup> *Ram Bharose v. Kallu Mal*, 22 All. 135; *Hazi Mahomed v. Dwarka Nath*, 11 C.L.J. 658; *Rajendra v. Panna Lal*, 36 Q.W.N. 8: 1932 Cal. 343; *Datoobhoy v. Vallu*, 1 Bom. L.R. 828; *Venkatachalam v. Ramnatham*, (1920) M.W.N. 502; *Firm of Radha Kishen v. Firm of Ahsa Mal*, 1926 Lah. 91: 92 I.C. 705: 7 L.L.J. 603; *Firm of Khalsa Bros. v. Hariram*, 1924 Sind 29: 83 I.C. 539: 17 S.L.R. 164; *Firm Mayadas v. Firm Bhagwandas*, 1924 Sind 41: 76 I.C. 359.

distinguished the early English cases as resting on special grounds.<sup>62</sup> In view of the present enactment, in order that submission to arbitration may be binding on other partners it must be shown that the reference to arbitration was sanctioned by usage or custom of trade governing the particular business. Courts would take judicial notice of the custom of certain importing firms not to do business with any firm unless the latter agrees to refer matters in dispute to arbitration, and the Court will presume that a partner of a firm dealing with such importing firm has authority to bind his firm by agreeing to refer disputes to arbitration.<sup>63</sup> In any case, the special authority may, however, be implied from conduct and the submission may be binding on others by ratification,<sup>64</sup> and where the partner submitting to the arbitration has to make payments in accordance with the award passed, he is entitled to claim contribution from his partner.<sup>65</sup>

**Plea of invalidity is one of fact :—**As an agreement to refer to arbitration by one of the partners though not originally binding may become so by acquiescence or acceptance of benefits, the question whether an award on a reference to arbitration by one of the partners without the concurrence of the legal representatives of a deceased partner is binding on them is not a simple question of law and therefore cannot be taken for the first time in appeal.<sup>66</sup>

**(b) Opening banking account :—**This clause is *Alliance Bank v. Kearsley*.<sup>67</sup>

<sup>62</sup> See Notes on Clauses.

<sup>63</sup> *Shimwell v. Baniram*, 3 S.L.R. 5 : 1 I.C. 937; *Firm of Khalsa Bros. v. Hariram*, 1924 Sind 29 : 83 I.C. 539 : 17 S.L.R. 164; see also *Firm Bishambar Mal v. Firm Ganga Sahai*, 1923 Lah. 212 : 71 I.C. 734 : 5 L.L.J. 5, where the award was held to be valid against the firm though the submission was signed by the managing partner.

<sup>64</sup> *Punniah v. Sree Venogopala Rice Factory*, 22 M.L.T. 520.

<sup>65</sup> *Venkatachalam v. Ramanathan*, (1920) M.W.N. 502.

<sup>66</sup> *Rai Dwarkanath v. Haji Mahomed*, 18 C.W.N. 1025 P.C.

<sup>67</sup> L.R. 6 C.P. 433.

(c) **Compromise and relinquishment** :—It seems that the cases contemplated by this clause should be distinguished from cases in which a partner gives a discharge upon payment. Each partner is an agent of the firm, and therefore, "as a debtor may lawfully pay his debt to one of them, he ought also to be able to obtain a discharge upon payment".<sup>68</sup> On the same principle, it has been held in a number of cases that in the absence of fraud and collusion with the defendant, release given by a partner of a cause of action in which all the partners are jointly interested operates as a release by the firm even though the release is given after an action is brought on the same.<sup>69</sup> But "as a general proposition, an authority to receive payment of a debt does not include an authority to settle it in some other way" and "although each partner has power to receive payment of a partnership debt, and to give a discharge for it on payment, it does not follow that he has power to compromise or settle the debt in any way he likes without payment."<sup>70</sup> In *Leake on Contracts* (page 673) it is said that "a release or agreement amounting to a release, upon a valid consideration and in the form of a binding contract may be effectual in equity in discharge of the debt but a voluntary release without deed and without consideration is equally inoperative in law and in equity." The law on the point is thus contained in *Halsbury* : "In the absence of fraud one partner may release a cause of action in which he and his partners are plaintiffs ; but he must have express authority to consent to judgment, or to submit a dispute to arbitration, or to compromise an action."<sup>72</sup> The last observation is based on *Crane v. Lewis*.<sup>73</sup> Hence it seems that

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<sup>68</sup> *Best, C.J. in Stead v. Salt*, (1825) 3 Bing. 103.

<sup>69</sup> *Furnival v. Weston*, (1882) 7 Moore (C.P.) 356; *Arton v. Booth*, (1820) 4 Moore (C.P.) 92; *Barker v. Richardson*, (1827) 1 Y. & J. 362; *Jones v. Herbert*, (1817) 18 R.R. 320; *Mangelsen v. Firm of Bhagwandas*, 1925 Sind 63 : 80 I.C. 538; see however, *Crane v. Lewis*, (1888) 36 W.R. 480 (Eng.).

<sup>70</sup> *Lindley*, p. 195.

<sup>72</sup> Vol. 22, p. 28.

<sup>73</sup> (1888) 36 W.R. 480 (Eng.).

the implied authority of a partner to receive payment of a partnership debt and to grant an effective discharge of the same is not affected by this clause.

Though a payment by a debtor of the partnership to one of the partners is *prima facie* a payment to the partnership,<sup>74</sup> an agreement by one partner to discharge a debt due to the firm by setting off his individual liability against it is not binding on the firm unless made with the consent of the other partners or subsequently ratified by them.<sup>75</sup>

In an ancestral Hindu joint family business the managing member can give a valid discharge without the concurrence of the minor member, when the discharge by an adult partner under the same circumstances would bind the minor.<sup>76</sup> But the son of a deceased partner cannot give a complete discharge of a debt due to the partnership,<sup>77</sup> and a release of property mortgaged to a firm as a whole is useless unless it is known who the individual partners are and whether the executant of the release is authorised by them to act on their behalf, because a conveyance to the firm operates as a conveyance to the individual partners.<sup>78</sup>

Although payment made to one partner is generally good payment to the firm, payment to a firm of a private debt due to one partner is not a discharge unless it is shown that the firm had in fact authority to receive it.<sup>79</sup>

**Right to avoid fraudulent discharge is personal:—**The right of some of the partners of a firm to avoid a fraudulent release of a debt by the other partners and to recover their share of the released debt is personal to them, and their legal representatives are not entitled to such a right.<sup>80</sup>

<sup>74</sup> *Moore v. Smith*, (1851) 14 Beav. 393.

<sup>75</sup> *Balkunt v. Hara Lal*, 13 C.L.J. 234.

<sup>76</sup> *Sadullakhan v. Bhanamal*, 58 P.R. 1882.

<sup>77</sup> *Lal Singh v. Dhanna Singh*, 1928 Lah. 832 : 109 I.C. 50.

<sup>78</sup> *Hirachand v. Jayagopal*, 49 Bom. 245 : 1925 Bom. 69 : 89 I.C. 553 : 26 Bom. L.R. 1049.

<sup>79</sup> *Powell v. Bodhurst*, (1901) 2 Ch. 160.

<sup>80</sup> *Palaniappa v. Veerappa*, 41 Mad. 446.

(d) **Withdrawing suit or proceeding** :—This clause is contrary to *Harwood v. Edwards* cited by Lindley at page 354, a case which seems to be unreported. It seems unreasonable to hold that a partner cannot compromise a claim by the firm but that he can withdraw the suit. This clause has been enacted as being best suited to Indian conditions.<sup>81</sup>

(e) **Admitting liability** :—This clause is in accordance with the decision in *Hambridge v. De la Crouee*<sup>82</sup> where it has been held that one partner has no authority to bind the firm by consenting to an order for judgment against it.

(f) **Acquiring immoveable property** :—This clause does not affect the implied authority of a partner to buy on credit of the firm any goods of a kind used in its business.<sup>83</sup>

(g) **Transferring immoveable property** :—This clause is covered by *Harrison v. Jackson*.<sup>84</sup> This clause too relates to immoveable properties only and does not affect the implied authority of a partner to sell any part of the goods or personal property of the partnership unless it is known to the purchaser that the intention of the partner is to convert the proceeds to his own use.<sup>85</sup>

(h) **Entering into partnership on behalf of the firm** :—This rule is taken from *Singleton v. Knight*.<sup>86</sup>

**20.** The partners in a firm may, by contract between the partners, extend or restrict the implied authority of any partner.

Extension and restriction of partner's implied authority.

Notwithstanding any such restriction, any act done by a partner on behalf of the firm which falls within his implied authority binds the firm, unless the person with whom he is dealing knows of the restriction or does not know or believe that partner to be a partner.

<sup>81</sup> Notes on clauses.

<sup>82</sup> 3 C.B. 742.

<sup>83</sup> *Bond v. Gibson*, (1808) 1 Camp. 185.

<sup>84</sup> *Harrison v. Jackson*, 7 T.R. 207.

<sup>85</sup> *Ex parte Bonbonus*, (1805) 2 Ves. 540.

<sup>86</sup> 13 A.C. 788.

**Old law:**—This section enacts the principle of the Exception to sec. 251 of the Indian Contract Act.

**Extending or restricting implied authority:**—As the guiding principle of the partnership law is to leave as much freedom as possible to the partners, this section authorises a trusted partner to do necessary acts which are in excess of the implied authority and to restrict the activities of an inexperienced partner.

These arrangements are made by the partners themselves in their own interests, and it is equitable that they should not prejudice third parties. Hence the second paragraph provides that a restriction placed on a partner's implied authority shall have no effect upon a third party dealing with a firm unless that third party has notice of the restriction.<sup>86a</sup> Each partner is unlimited agent of every other in every matter concerning the partnership irrespective of private arrangements between the partners. This rule applies to joint Hindu family firms also.<sup>87</sup> Even a secret limitation of the ordinary authority of the active partner will not avail the dormant partner.<sup>88</sup> Every person dealing with a firm is entitled to assume that all the partners wield the full implied authority, subject only to such restrictions as have been brought within his knowledge. So even if the implied authority has been expressly cancelled but such cancellation is not brought to the knowledge of the creditor, the creditors are entitled to recover against the other partners.<sup>89</sup>

But if the restrictions are within his knowledge, he cannot of course charge the other partners with liability, *e.g.*, where in spite of notice that one of the two partners has no authority to accept bills or, without the written request of the other, to order a supply of goods, he deals with the partner in disregard of the restriction.<sup>90</sup> So 'if a person lends money to

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<sup>86a</sup> Notes on Clauses.

<sup>87</sup> *Ghulam Mahomed v. Sohna Mal*, 1927 Lah. 385 : 101 I.C. 742 : 28 P.L.R. 307 : 9 L.L.J. 233.

<sup>88</sup> *Watteau v. Fenwick*, (1893) 1 Q.B. 346.

<sup>89</sup> *Mothilal v. Unao Commercial Bank*, 1930 P.C. 238 : 35 C.W.N. 1.

<sup>90</sup> *Alderson v. Pope*, 1 Camp. 404; *Rooth v. Quin*, 7 Price, 193; see also *Bunarsee v. Gholam*, 13 M.I.A. 358 : 13 W.R. 29 P.C.

a partner for purposes for which he has no authority to borrow it on behalf of the partnership, the lender having notice of that want of authority cannot sue the firm'.<sup>90a</sup> Similarly, when a separate creditor of one partner knows he has received money out of partnership funds, he must know at the same time that the partner so paying him is exceeding the authority implied in the partnership—that he is going beyond the scope of his agency ; and express authority therefore is necessary from the other partner to warrant that payment.<sup>90b</sup>

**Dormant partner :—**The last portion of the section deals with a case where the third party does not know that he is dealing with a partner in a firm, when obviously he has no expectations from the firm and has no right to hold it liable if the partner exceeds his actual authority.<sup>91</sup> But if a mere dormant partner were known to be a partner, and the limitation of his authority were not known, he might be able to draw bills and give orders for goods which would bind his co-partners, though in the ordinary case this would not be so, and he would not in the slightest degree be in a position of an agent for them.<sup>92</sup>

**21. A partner has authority, in an emergency, to do all such acts for the purpose of protecting the firm from loss as would be done by a person of ordinary prudence, in his own case, acting under similar circumstances, and such acts bind the firm.**

Partner's authority in an emergency.

**Authority in emergency :—**This is a new provision and a departure from the English law. The English Partnership Act contains no provision enabling a partner to bind the firm by any act done in an emergency for the preservation of the business or property of the firm, when the act is not in accordance with the usual method of transacting business. In fact the

<sup>90a</sup> *Bank of Australasia v. Breillat*, (1847) 6 Moo. P.C. 196.

<sup>90b</sup> *Kendal v. Wood*, (1871) L.R. 6 Ex. 253.

<sup>91</sup> Notes on clauses.

<sup>92</sup> *Cleasby, B., in Holmes v. Hammond*, (1872) L.R. 7 Ex. at p. 233.

law may be stated to be that the power to do what is usual does not extend to do what is unusual. Hence under the English law if there was no necessity, for example, to borrow money to carry on the business in ordinary circumstances and in ordinary manner the firm would not be liable for money borrowed by its agents under extraordinary circumstances as being absolutely necessary to save the property of the firm from ruin.<sup>93</sup> Provision has been made in section 13 (e) (ii) for indemnity of a partner by his co-partners while acting in extraordinary circumstances. Emergency powers are conceded to an agent under sec. 212, Contract Act and this section makes the emergency powers of a partner co-extensive with his right of indemnity.

**22.** In order to bind a firm, an act or instrument done or executed by a partner or other person on behalf of the firm shall be done or executed in the firm name, or in any other manner expressing or implying an intention to bind the firm.

Mode of doing act to bind firm.

**Acts and instruments in firm name :—**All the partners of a firm are bound by acts and instruments done and executed in relation to the business by any person duly authorised, whether a partner or not, if done in the firm's name or with evident intention to bind the firm.<sup>94</sup>

A partner is an agent of the firm of which he is a member and while acting within the express or implied authority his act binds the firm. But in order that the firm may be liable for his act or any instrument executed by him he must act as agent of the firm, and not on his own account as principal in which cases the firm would not be liable in spite of the fact that it derived benefit.<sup>95</sup> The mere fact that money, borrowed by a partner in his own name on security belonging to him personally, has been used for the purposes of his firm with the

<sup>93</sup> See *Hawlayne v. Bourne*, 7 M. & W. 595.

<sup>94</sup> Halsbury, Vol. 22, p. 32, para. 56.

<sup>95</sup> *Emly v. Lye*, 15 East 7.



knowledge of his partners does not render them liable,<sup>96</sup> though he may be entitled to be indemnified by them.<sup>97</sup> That is, the ultimate use by the firm of money borrowed by one of its members on his own credit does not render the firm liable for the loan, and so the question upon which the liability or non-liability of a firm depends is not whether the firm obtained benefit under the contract but did the firm by one of its partners or otherwise enter into the contract. The circumstance that the firm obtains the benefit of a loan contracted by a single member is only a piece of evidence to show that he entered into the transaction as a member of the firm. So where one member of the partnership borrows money on his own credit by giving his own pro. note and he afterwards uses the proceeds of that pro. note in the partnership of his own free will without being under any obligation to or contract with the lender to do so, the partnership is not liable for the loan.<sup>98</sup> A partner is not therefore liable for the action of the other partners unless the same is on behalf of the partnership.<sup>99</sup>

The firm as principal may, however, be disclosed or undisclosed. If the principal is disclosed the agent is not personally bound by the act (vide sec. 230, Indian Contract Act) but if the principal is undisclosed the act is that of the agent though when the undisclosed principal is discovered he may be held liable instead of the agent (vide sec. 233, Indian Contract Act).

Hence if a contract is entered into in his own name by one partner, his co-partners will be liable under the contract as being undisclosed principals if in fact the contracting partner was acting as agent of the firm. And in such cases it is no defence to the co-partners that no allusion was made to them

<sup>96</sup> *Bevan v. Lewis*, (1827) 1 Sim. 376. Halsbury, Vol. 22, p. 33, para. 58.

<sup>97</sup> *Browne v. Gibbins*, (1726) 5 Bro. Parl. Cas. 491; *Re Oundle Union Brewery Co.*; *Croxtan's case*, (1852) 5 De G. & Sm. 432.

<sup>98</sup> *Ram Chandra v. Kasem Khan*, 28 C.W.N. 824 : 81 I.C. 513 : 1925 Cal. 29.

<sup>99</sup> *Seth Abde v. Askaram*, 1924 Nag. 411 : 84 I.C. 199 : 20 N.L.R. 140.

in the contract.<sup>1</sup> Each partner is an agent for the others, and it is not necessary that the name of the firm should be so used in order to make it a partnership debt, provided it *shows* that the debt was taken for and appropriated to the firm.<sup>2</sup> Thus if one partner acting in fact for the firm, orders goods, and they are supplied to him, the firm will be liable to pay for them, although no mention was made of his co-partners,<sup>3</sup> and they were unknown to the seller of the goods.<sup>4</sup> On the other hand, if one partner deals on his own account as principal the firm would not be liable for any contract entered into by him. Thus, where persons work a coach in partnership, each having his own horses, and one of them orders fodder on his own account, he alone is liable for it.<sup>5</sup>

With respect to bills of exchange and promissory notes the rule is otherwise. "Subject to the qualifications that the name of a firm is equivalent to the name of all persons liable as partners in it, no person whose name is not on a bill or note is liable to be sued upon it.<sup>6</sup> In order, therefore, that a bill or note may be binding on a firm, the name of the firm must be upon it; and if the names of one or more of the partners only are upon it, the others will not be liable to be sued upon the instrument, whatever may be their liability as regards the consideration for which it may have been given."<sup>7</sup> Nobody is liable upon a promissory note unless his name or the name of some partnership or body of persons of which he is one appears on the note.<sup>8</sup> And if the bill or note is signed by

<sup>1</sup> *Beckham v. Drake*, 9 M. & W. 79.

<sup>2</sup> *Krishnadhan v. Sanyasi Charan*, 23 C.W.N. 500, 508.

<sup>3</sup> *City of London Gas Light and Coke Co. v. Nicholls*, 2 Car. & P. 365; *Whitwell v. Perrin*, 4 C.B.N.S. 412.

<sup>4</sup> *Ruppell v. Roberts*, 4 Nev. & Man. 31; *Robinson v. Wilkinson*, 3 Price 348; *Bottomley v. Nuttall*, 5 C.B.N.S. 122; *Lindley*, p. 245.

<sup>5</sup> *Barton v. Hanson*, 2 Taunt. 49.

<sup>6</sup> *Lloyd v. Ashby*, 2 C. & P. 138; *Bucarry v. Gill*, 4 ib. 121; *Eastwood v. Bain*, 3 H. & N. 738.

<sup>7</sup> *Bottomley v. Nuttall*, 5 C.B.N.S. 122; *Miles' claim*, 9 Ch. 635; *Lindley*, p. 247.

<sup>8</sup> *Baisini Raidi v. Yamanna*, 4 M.L.J. 76.

a partner in his individual capacity and not on behalf of the firm, the other partners would not be liable.<sup>9</sup>

Where however some of the partners signed a pro. note without any words following their signatures to show in what capacity they signed, but the pro. note sufficiently disclosed that the agreement was made on behalf of the firm, *held* that the other partners were bound by the pro. note.<sup>10</sup> Similarly if a newly constituted partnership agrees among its members that the members of the new partnership shall have the power to bind it for the taking on of the debts of the previous firm which the new partnership had taken over, that would be binding on the new partnership, provided, however, there is anything in the transaction to show that the persons who executed the bills or notes or whatever is relied upon, were purporting to act on behalf of the new partnership.<sup>11</sup>

It is important to note that the principle that only the maker of a pro. note can be held liable thereunder is not applicable where an independent contract is alleged and the suit is based upon consideration received. If the plaintiff can show that there was a contract with the partnership and the pro. note executed by a partner in his own name was merely evidence of such contract, all the partners would appear to be liable.<sup>12</sup>

Words which may be construed as merely a description or as showing the designation of the person signing the instrument will not be sufficient to make the firm liable.<sup>13</sup> A pro. note was headed "The Lahore Cotton Baling Press" and signed by one G alone. A suit was brought against G and H alleging that H

<sup>9</sup> *Yorkshire Banking Co. v. Beatson*, 42 L.T. 455.

<sup>10</sup> *Pattabhirami v. Baillah*, 1928 Mad. 1196: 113 I.C. 380: 1928 M.W.N. 698: 29 M.L.W. 494: 35 M.L.J. 574.

<sup>11</sup> *Panduranga v. Krishna*, 1927 Mad. 889: 105 I.C. 209: 39 M.L.T. 266: 53 M.L.J. 303:

<sup>12</sup> *Pynda Venkatachalapati v. Pynda Ramakrishnayya*, 1930 Mad. 168: 123 I.C. 358.

<sup>13</sup> *Dutton v. Marsh*, (1871) 6 Q.B. 361; *Atmaram v. Notandas*, 1930 Sind 4.

was the partner and thus liable: *held* that the form of the document showed that H was not liable.<sup>14</sup>

A partner may be restrained by injunction from drawing, accepting, or negotiating bills of exchange for his own purposes in the name of the firm.<sup>15</sup>

This section applies when the dealing is with a third party. So where two of the partners of a firm execute a pro. note in favour of a third agreeing to pay him a certain sum of money as being due to him on taking partnership accounts, the remaining partners of the firms will not be bound by the pro. note.<sup>16</sup>

**Oral Evidence** :—Under English law, in an action on a written contract, oral evidence is admissible to show that the party liable on the contract contracted for himself and as agent of his partners. Such partners are liable to be sued on the contract though no allusion is made to them in it. This is also the law in India as there is nothing in sec. 91, Evidence Act, to show that the legislature intended to depart from this settled rule of the English law.<sup>17</sup>

**23. An admission or representation made by a partner concerning the affairs of the firm is evidence against the firm, if it is made in the ordinary course of business.**

Effect of admissions by a partner.

**Admissions concerning firm's affairs** :—This section speaks of admissions or representations concerning the affairs of the firm. Hence it would not apply to representations made by a partner regarding the extent of his authority.<sup>18</sup> With respect to other admissions, though evidence against the firm, they are not necessarily conclusive.<sup>19</sup>

<sup>14</sup> *D. Johnston v. Mt. Jan Bibi*, 1928 Lah. 722 : 111 I.C. 645.

<sup>15</sup> Halsbury, Vol. 22, p. 81, para. 158.

<sup>16</sup> *Hoshlar Singh v. Udal Ram*, 1929 All.\* 542 : 117 I.C. 108 : 1929 A.L.J. 929.

<sup>17</sup> *Venkatasubblah v. Govindarajulu*, 31 Mad. 45.

<sup>18</sup> *Ex parte Agace*, (1792) 2 Cox. 312.

<sup>19</sup> *Wickham v. Wickham*, 2 K. & J. 478, 491; *Stead v. Salt*, (1825) 3 Bing. 103.

**24.** Notice to a partner who habitually acts in the business of the firm of any matter relating to the affairs of the firm operates as notice to the firm, except in the case of a fraud on the firm committed by or with the consent of that partner.

Effect of notice to acting partner.

**Notice to acting partner :—**This section is based on the principles laid down in section 229 of the Indian Contract Act that notice to an agent in course of the business is notice to the principal. In order that notice to a partner may have the effect of notice to the firm it is essential that the notice should be given to one who 'habitually acts in the business of the firm' and hence the same effect would not follow if notice is given to a dormant partner. Again, "where one member is acting beyond his powers, or is committing a fraud on his co-partners, or is the person whose duty it is to give his firm notice of what he himself has done, in all such cases notice on his part is not equivalent to notice to them."<sup>20</sup>

**25.** Every partner is liable, jointly with all the other partners and also severally, for all acts of the firm done while he is a partner.

Liability of a partner for acts of the firm.

**Old law :—**Sections 249 and 250 contained the principles of law contained in this section but the nature of the liability is made clear by the addition of the words "jointly with all the other partners and also severally."

**Joint and several liability :—**Section 43 of the Indian Contract Act makes joint promisors generally liable jointly and severally, and this general principle has been applied to partnership liabilities.<sup>21</sup> The liability relate to both contracts and torts.

<sup>20</sup> Lindley, p. 184.

<sup>21</sup> *Motilal v. Ghellabhai*, 17 Bom. 6, 11; *Lakmidas v. Purshotam*, 6 Bom. 700; *Appa Dada Pathi v. Ramkrishna*, 1930 Bom. 5; *Narayana v. Lakshmana*, 21 Mad. 256; *Mohun v. Sri Gungaji Cotton Mills*, 4 C.W.N.

**Contribution** :—Though partners are jointly liable to third persons, a partner who pays more than his share of a partnership debt, whether voluntarily or not,<sup>22</sup> is entitled to contribution from his partners.<sup>23</sup>

**26.** Where, by the wrongful act or omission of a partner acting in the ordinary course of the business of a firm, or with the authority of his partners, loss or injury is caused to any third party, or any penalty is incurred, the firm is liable therefor to the same extent as the partner.

Liability of the firm for wrongful acts of a partner.

**Change in law** :—Sec. 250 of the Indian Contract Act contained the principle of this section, but that section was limited to cases of neglect or fraud whereas the present section is more comprehensive.

**When the liability arises** :—"A partner is liable for the debts incurred by his firm from the date fixed for the commencement of his partnership, although the partnership deed may be executed at later date,<sup>24</sup> notwithstanding an arrangement to the contrary between himself and his partners.<sup>25</sup> But in the absence of an express stipulation to the contrary, a partnership commences from the date of the articles of partnership, and evidence of parol agreement that it was to commence on a future date is inadmissible."<sup>26</sup>

As the liability is for acts of the *firm*, partners are not liable for goods, etc., purchased on the credit of an individual

369; *Mahomed Ismail v. Saiduddin*, 104 I.C. 770; *Thomas Beck v. Thomas Siddle*, 1892 P.R. 11; *Jag Lal v. Shib Lal*, 1902 P.R. 37.

<sup>22</sup> *Sadler v. Nixon*, (1834) 5 B. & Ad. 936.

<sup>23</sup> *Boulter v. Peplow*, (1850) 9 C.B. 493; *Sedgwick v. Daniell*, (1857) 2 H. & N. 319; *Batard v. Hawes*, (1853) 2 E. & B. 287. Halsbury, Vol. 22, p. 35, para. 66.

<sup>24</sup> *Battley v. Lewis*, (1840) 1 M. & G. 155.

<sup>25</sup> *Wilson v. Lewis*, (1840) 2 Man. & G. 197.

<sup>26</sup> *Williams v. Jones*, (1826) 5 B. & C. 108. Halsbury, Vol. 22, p. 36, 37, para. 68 and f.n. (a).

adventurer previously to the contract of partnership though afterwards brought into the common stock as his contribution.<sup>27</sup>

This section follows from the principle of principal's liability for the acts of his agent and the nature and extent of the firm's liability for the wrongful act or omission of a partner is governed in much the same principle. The first point of importance is that for the purpose of making the firm liable for the wrongful act or omission of partner, he must have acted in the ordinary course of the business of the firm. If the act is unconnected with the firm's business, or if the fraud is committed while the partner is not acting as a member of the firm, his innocent co-partners cannot be held liable for any consequent loss or injury caused to third persons. Hence a fraud committed by a partner while acting on his own separate account and not as agent of the firm is not imputable to the firm although had he not been connected with the firm he might not have been in a position to commit the fraud.<sup>28</sup> Thus where one partner, though the managing partner, maliciously prosecutes a person, such person has no cause of action against the other partners unless such partners are privy to the action,<sup>29</sup> or unless it is shown that the firm was in some way or other concerned in the prosecution and had instigated it.<sup>30</sup> But the firm would be liable when its managing partner without the knowledge of the other member knowingly received stolen goods and credited a portion of the sale proceeds to the firm, and its liability would extend to the value of all the goods which had come into the hands of the managing partner.<sup>31</sup> Where a solicitor connived at a fraud committed by a client in drawing out money from Court, the other partners of the solicitor's firm were held liable to make good the money to the real owner.<sup>32</sup>

<sup>27</sup> *Karamall Abdulla v. Vora Karimji*, 19 C.W.N. 377, P.C.

<sup>28</sup> *Munshi Bastruddin v. Surya Kumar*, 12 C.W.N. 716, 719; quoting from Lindley.

<sup>29</sup> *Arbuckle v. Taylor*, (1815) 3 Dow. 160.

<sup>30</sup> *Ahmedbhai v. Framji*, 28 Bom. 226, 231.

<sup>31</sup> *Hurruck Chand v. Gobind Lal*, 10 C.W.N. 1053.

<sup>32</sup> *Brydges v. Branfill*, 12 Sim. 369.

On similar principles, a firm would be liable if one of its members bribes the clerk of their competitor's business unlawfully to disclose confidential particulars even though it was within the course of business of the firm to obtain information about their competitor's business by legitimate means.<sup>33</sup>

Innocent partners are liable for the misrepresentations of one of their partners in matters connected with the ordinary business of the firm.<sup>34</sup> One partner is not liable for the trespass of another unless committed with his knowledge or ratified by him.<sup>35</sup>

**Liability for negligence:**—On the same principle, the firm would be liable for the negligence of one of its members in the ordinary course of the partnership business.<sup>36</sup> Thus a firm of coach proprietors would be liable for the negligent driving of a coach by one of its members.<sup>37</sup> So a partnership would be liable for the negligence of its servants acting in the course of employment by the firm.<sup>38</sup>

With respect to the liability of dormant partners: a distinction must be drawn between—first, undisclosed principals who carry on a business by partners or agents; and, secondly, persons who simply share the profits of a business carried on by others on their own account, i.e., as principals only, and not as agents for those who share their profits. In the first case the dormant partners are liable for whatever may be done by their partners and agents in the course of transacting the business in the ordinary way; but in the second case the so-called dormant partners are not principals at all, the persons who carry on their business do not carry it

<sup>33</sup> *Hamlyn v. Houston & Co.*, (1903) 1 K.B. 81.

<sup>34</sup> *Rapp v. Latham*, (1819) 2 B. & Ald. 795; Halsbury, Vol. 22, p. 31, para. 55.

<sup>35</sup> *Petrie v. Lamont*, (1841) Car. & M. 93; Halsbury, Vol. 22, p. 32, para. 55.

<sup>36</sup> *Ashworth v. Stanwix*, (1861) 3 E. & E. 701; *Mellors v. Shaw*, (1861) 1 B. & S. 437.

<sup>37</sup> *Moreton v. Harden*, 4 B. & C. 223.

<sup>38</sup> *Stables v. Eley*, 1 Car. & P. 614.



on as their agents either really or apparently, and the doctrines applicable to undisclosed principals are altogether excluded.<sup>39</sup>

Liability of firm for  
misapplication by part-  
ners.

## 27. Where—

- (a) a partner acting within his apparent authority receives money or property from a third party and misapplies it, or
- (b) a firm in the course of its business receives money or property from a third party, and the money or property is misapplied by any of the partners while it is in the custody of the firm,

the firm is liable to make good the loss.

**Cl. (a). Money or property must be received in the usual scope of business :—**This sub-section contemplates a case where the partner who receives money or property from a third person himself misapplies it. In order that this section may apply it is necessary that the partner must have received the money or property within his apparent authority. Thus where one of two solicitors forming a partnership applies to his own use a sum of money given to him by a client to be invested on a specific security in the ordinary business of solicitors, the other partner is liable to make good the loss even though he received no part of the money and knew nothing of the transaction.<sup>40</sup> But "if a partner in the course of some transaction unconnected with the business of the firm, or not within the scope of such business, obtains money and then misapplies it, the firm is not without more liable to make good the loss."<sup>41</sup> Thus if in the above case the money had been given with general directions to invest it the innocent partner would not be liable because it is no part of the ordinary business of solicitors to receive money to be

<sup>39</sup> Lindley, pp. 178, 179.

<sup>40</sup> *Blair v. Bromley*, 2 Ph. 354; *Willett v. Chambers*, Cowp. 514; *Atkinson v. Macreth*, 2 Eq. 570; *St. Aubyn v. Smart*, 5 Eq. 183.

<sup>41</sup> Lindley, p. 224.

invested at their discretion.<sup>42</sup> Similarly where one of two solicitors constituting a firm received money from one of their clients on the representation that it would be invested on a mortgage of some real estate of another client of theirs without describing it specifically, and applied it to his own use, his other partner was not liable for the money.<sup>43</sup>

**Sub-sec. (b) Misapplication of money or property received by the firm :—**This sub-section contemplates a case of receipt of money or property by the firm and its misapplication by any of its members. The reason of the rule is that 'the firm has in the course of its business obtained possession of the property of other people and has then parted with it without their authority.' Thus misapplication of trust money in the hands of a banking firm by one of its members who withdrew it is covered by this section.<sup>44</sup> So where some members of a firm transacting banking business sell their customer's securities deposited with the firm for safe custody, all members of the firm are liable for the value notwithstanding that the other members did not know of the sale.<sup>45</sup> The liability of the other members would be same even if the customer's property, according to the practice of the firm, stood in the name of one of the partners who misapplied it.<sup>46</sup> Further, 'the fact that the property has been improperly procured and placed in the custody of the firm by one of the partners, does not lessen the liability of the firm ; for whether the firm is or is not liable for the original fraud by which the property got into his hands, it is responsible for the subsequent misapplication thereof by one of its members.'<sup>47</sup> Thus where a partner of a banking firm forges a power of attorney from a customer to himself and the other partners and thereby procures a transfer of stock standing in the name of the customer in another bank,

<sup>42</sup> *Harmagn v. Johnson*, 2 E. & B. 61.

<sup>43</sup> *Plumer v. Gregory*, 18 Eq. 621.

<sup>44</sup> *Ex parte Biddulph*, 3 De G. & Sm. 587.

<sup>45</sup> *Devaynes v. Noble*, *Clayton's case*, 1 Mer. 575.

<sup>46</sup> *Devaynes v. Noble*, *Baring's case*, 1 Mer. 61.

<sup>47</sup> *Lindley*, p. 223.

and the proceeds of the stock are credited to his own banking firm in their pass-book with another bank, and then draws out these monies by a cheque signed by him in the name of his firm and misapplies them to his own use, *held* that the firm is liable.<sup>48</sup>

But if the misapplication by a partner had been unconnected with the business of the firm, the firm is not liable for it. Thus if two solicitors forming a firm have invested their client's money on a mortgage according to his direction, and one of them receives the principal money without the client's directions and misapplies it without his co-partner's knowledge, his co-partner is not liable as it was no part of the firm's business to receive the principal money.<sup>49</sup>

**28. (1)** Any one who by words spoken or written

or by conduct represents himself,  
Holding out. or knowingly permits himself to

be represented, to be a partner in a firm, is liable as a partner in that firm to any one who has on the faith of any such representation given credit to the firm, whether the person representing himself or represented to be a partner does or does not know that the representation has reached the person so giving credit.

(2) Where after a partner's death the business is continued in the old firm name, the continued use of that name or of the deceased partner's name as a part thereof shall not of itself make his legal representative or his estate liable for any act of the firm done after his death.

**Change in law :—**This section combines the rule of law contained in sections 245 and 246 of the Indian Contract Act.

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<sup>48</sup> *Stone v. Marsh*, 6 B. & C. 551; *Marsh v. Keating*, 2 Cl. & F. 250.

<sup>49</sup> See *Sims v. Brutton*, 5 Ex. 802.

**Sub-sec. (1). Holding out—partner by estoppel :—**

Where a man holds himself out as a partner or allows others to do it, he is then properly estopped from denying the character he has assumed, and upon the faith of which creditors may be presumed to have acted. A man so acting may be rightly held liable as a partner by estoppel.<sup>50</sup> The doctrine of holding out is a branch of the doctrine of estoppel.<sup>51</sup> It is immaterial whether that man fraudulently or even negligently led others to believe that he was a partner and to act upon that belief. Even want of knowledge on his part of the effects of his act and conduct would not absolve him from liability, if his acts and conduct were such as would induce a reasonable man to believe that he was a partner and to act upon such belief.<sup>52</sup> If a man, whatever his real intention may be, so conducts himself that a reasonable man would take his conduct to mean a certain representation of facts and that it was a true representation, and that the latter was intended to act upon it in a particular way, and he with such belief does act in that way, the first is estopped from denying that the facts were so represented.<sup>53</sup> In *Dickenson v. Valpy*,<sup>54</sup> which is a case of partnership, Parke, J., said: "The defendant would be bound by an indirect representation to the plaintiff, arising from his conduct, as much as if he had stated to him directly and in express terms that he was a partner, and the plaintiff had acted upon that statement." No evidence of intention or knowledge of the consequences of his acts or conduct is necessary to make the apparent partner liable, as it is an established principle of the law that people are presumed to intend the reasonable consequences of their acts.<sup>55</sup>

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<sup>50</sup> *Mollwo, March & Co. v. The Court of Wards*, 18 W.R. 384. 387 P.C.

<sup>51</sup> *Re Fraser, Ex parte Central Bank of London*, (1892) 2 Q.B. 633, C.A., per Lord Esher, M.R., at p. 637.

<sup>52</sup> *Porter v. Incell*, 10 C.W.N. 313, 319.

<sup>53</sup> *Carr v. London and N. W. Ry. Co.*, L.R. 10 C.P. 316.

<sup>54</sup> 10 B. & C. 128.

<sup>55</sup> *Porter v. Incell*, 10 C.W.N. 313, 320.

Hence "one who makes an assertion intending it to be repeated and acted upon, or even under such circumstances that it is likely to be repeated and acted upon by third persons, will be liable to those who afterwards hear of it and act upon it."<sup>56</sup> In cases where the defendant has not held himself out, but where he has been held out by others, and he alleges that they had no authority to do so, express authority is not necessary, authority may be inferred from his conduct.<sup>57</sup>

From the very principle it is clear that the real relation of the person who holds himself out as a partner to a firm is immaterial. "A case may be stated, in which it is the clear sense of the parties to the contract that they shall not be partners; that A is to contribute neither labour nor money, and to go still further, not to receive any profits. But if he will lend his name as a partner, he becomes, as against all the rest of the world, a partner, not upon the ground of the real transaction between them, but upon principles of general policy to prevent the frauds to which creditors would be liable, if they were to suppose that they lent their money upon the apparent credit of three or four persons, when in fact they lent it only to two of them to whom without the others they would have lent nothing."<sup>58</sup> Similarly, a clerk or servant,<sup>59</sup> or a partner who has retired without giving proper notice of the fact<sup>60</sup> may be liable as a partner by estoppel. Where a business was carried on in the name of the defendant and another, and the defendant was authorised to draw cheques on banking account kept in the two names and there were other circumstances indicating a partnership, *held* that the defendant was a partner.<sup>61</sup> It makes

<sup>56</sup> Pollock, p. 60; *Martyn v. Gray*, 14 C.B.N.S. 824, 841.

<sup>57</sup> See Lindley, p. 77.

<sup>58</sup> Per Byre, C.J.; *Waugh v. Carver*, 2 H.Bl. 246.

<sup>59</sup> *Kirkwood v. Cheetham*, (1862) 2 F. & F. 798; *Ex parte Watson*, (1815), 19 Ves. 459, 461; *Peacock v. Peacock*, (1809) 2 Camp. 45.

<sup>60</sup> Sec. 32 (3).

<sup>61</sup> *Maurice Mayahas v. Morley*, 29 C.W.N. 496: 1927 Cal. 937: 87 I.C. 508.

no difference even if the creditor knows of the existence of an agreement between the apparent partners that the party lending his name to the firm shall not have the rights or incur the liabilities of a partner. For his name, if lent upon a private indemnity as between the lender and borrower, is still lent for the very purpose of obtaining credit for the firm on the faith of his being responsible; and the duty of the other partners to indemnify him, so far from being inconsistent with his liability to third persons, is founded on it and assumes it as unqualified.<sup>62</sup> But the use of a man's name without his knowledge cannot make him a partner by estoppel.<sup>63</sup>

The rule of liability by holding out is a branch of the law of estoppel and it can be relied upon only by persons to whom the representation had been made and who have acted on the faith of its being true,<sup>64</sup> that is, it can only conclude the defendants with respect to those who have altered their condition on the faith of its being true.<sup>65</sup> So in order that a person may be liable as a partner under this section, it is essential that his words or conduct must induce the contract and hence his words or conduct must precede the contract,<sup>66</sup> and the use of his name must be known to the person who wants to take advantage of them.<sup>67</sup> Further, in the case of representation by conduct the acts relied on must not be ambiguous.<sup>68</sup> Names are however indiscriminately used by Indian firms to designate their firms and the mere use of such a name would not lead any member of the public or any

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<sup>62</sup> Pollock, p. 59.

<sup>63</sup> *Fox v. Clifton*, 6 Bing. 776.

<sup>64</sup> *Harnamdas v. Firm Mayadas*, 1925 Sind 310: 87 I.C. 905; *Re Fraser, Ex parte Central Bank of London*, (1892) 2 Q.B. 633, 637 C.A. *M'Iver v. Humble*, (1812) 16 East. 169, 174; *Carter v. Whalley*, (1830) 1 B. & Ad. 11, 14; *Lloyd v. Ashby*, (1825) 2 C. & P. 138.

<sup>65</sup> *Quarman v. Burnett*, (1840) 6 M. & W. 508.

<sup>66</sup> *Baird v. Planque*, 1 Fos. & Fin. 344.

<sup>67</sup> See *Fox v. Clifton*, 6 Bing. 776.

<sup>68</sup> *Edmundson v. Thompson*, (1861) 2 F. & F. 564.

dealer to presume in India that the person whose name is used is also a partner of the firm.<sup>69</sup>

As the liability by 'holding out' rests on the presumption that credit was given to the firm on the strength of the apparent partner's name, this has no application to causes of action independent of contract<sup>70</sup> e.g., to a case of tort.

**Sub-sec. (2). Use of firm's name after a partner's death :—**

The doctrine of estoppel by holding out has no application to cases where the business is continued in the old firm name after the death of a partner and does not bind his estate whether the creditor knows of his death or not. Where after a partner's death all that was attempted to be proved was that : (a) the widow of the deceased partner allowed the capital which belonged to her husband to remain in the firm : (b) that the surviving partners carried on the business in the old firm name : (c) that the profit due to her husband during his lifetime was credited to the personal account of her husband with her consent or to her knowledge : and (d) that a certain sum of money was paid by the surviving partners out of the charity account of the firm to commemorate the name of her husband, it was held that these facts were not sufficient to render her liable as a partner of the firm.<sup>71</sup>

**29. (1)** A transfer by a partner of his interest in the firm, either absolute or by mortgage, or by the creation by him of a charge on such interest, does not entitle the transferee, during the continuance of the firm, to interfere in the conduct of the business, or to require accounts, or to inspect the books of the firm, but entitles the transferee only to receive the share of profits of the transferring partner, and the

Rights of transferee of a partner's interest.

<sup>69</sup> *Nem Chand v. Gur Dayal*, 1925 Oudh 451 : 88 I.C. 584 : 12 O.L.J. 285 : 2 O.W.N. 296.

<sup>70</sup> See Pollock, p. 61.

<sup>71</sup> *Radhakishen v. Mt. Gangabal*, 1928 Sind 121 : 110 I.C. 730 : 22 S.L.R. 105.

transferee shall accept the account of profits agreed to by the partners.

(2) If the firm is dissolved or if the transferring partner ceases to be a partner, the transferee is entitled as against the remaining partners to receive the share of the assets of the firm to which the transferring partner is entitled, and, for the purpose of ascertaining that share, to an account as from the date of the dissolution.

**The principle :—**This section relates to assignees of the whole of a partner's share in the firm. These persons may be complete strangers to the non-transferring partners and may be personally objectionable to them.

**Effect of assignment :—**The effect of an assignment of a share in a partnership by a partner to an outsider is not to render it illegal and void as between the parties to the assignment.<sup>72</sup> The assignee has a right against the assignor,<sup>73</sup> and the assignment may create a sub-partnership between the assignor and the assignee but does not confer upon the assignee the rights of a partner as against the original firm. If one partner assigns his share to an outsider without the consent of his partners during the existence of partnership, no immediate rights accrue to the assignee as against the other partners. One partner cannot by his action introduce a third party without the consent of the other partners, so as to give the third party a right to interfere in the management of the business or to ask for an account. It is only when dissolution occurs that the right of the assignee arises to take action in the same way as his assignor could have done to claim an account as from the date of the dissolution. But it is the assignor and not the assignee who can sue for dissolution.<sup>74</sup>

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<sup>72</sup> *Juggut Chunder v. Radha Nath*, 10 Cal. 669.

<sup>73</sup> *Dhanji v. Gulabchand*, 1925 Bom. 347 : 87 I.C. 812 : 27 Bom. L.R. 409.

<sup>74</sup> *Dhanji v. Gulabchand*, 1925 Bom. 347 : 87 I.C. 812 : 27 Bom. L.R. 409.



**Assignment if causes dissolution :—**An assignment of his interest by one partner to another, where there are only two partners, operates as a dissolution,<sup>75</sup> but where there are more than two the point is doubtful.<sup>76</sup>

In cases of assignment of his share by a partner to an outsider the Calcutta High Court held that the assignment would cause an immediate dissolution of partnership,<sup>77</sup> but this view was dissented from in a case of the Bombay High Court.<sup>78</sup> The assignment merely gives a right of action to the other partners to ask the Court to dissolve the partnership. The Privy Council held that on an assignment of the shares of some partners, the other partners who did not relinquish their claim upon the assignors as partners are entitled to sue for the winding up of the partnership and for a decree for account as against the assignor-partners and the assignees.<sup>79</sup> In the present Act, under section 44 (e), an assignment is a ground for dissolution by Court at the suit of a partner.

**Rights and duties of assignee :—**This section gives the assignee very limited rights. Subject to equities arising between the assignor and his partners at the date of assignment,<sup>80</sup> and also subsequent to that date,<sup>81</sup> (a) he is entitled to the share of the profits to which the assigning partner would be otherwise entitled;<sup>82</sup> (b) the assignee must accept the amount of profits agreed to by his partners. He must accept the accounts in the

<sup>75</sup> *Heath v. Samson*, (1832) 4 B. & Ad. 172.

<sup>76</sup> Halsbury, Vol. 22, p. 58, para. 111.

<sup>77</sup> *Juggut Chunder v. Radha Nath*, 10 Cal. 669.

<sup>78</sup> *Dhanji v. Gulabchand*, 1925 Bom. 347 : 87 I.C. 812 : 27 Bom. L.R. 409.

<sup>79</sup> *Domaty Nurstah v. Ramen Chetty*, 27 Cal. 93 P.C.

<sup>80</sup> *Cavander v. Bulteel*, (1873) 9 Ch. App. 79; *Smith v. Parkes*, (1852) 16 Beav. 115; *Kelly v. Hutton*, (1868) 3 Ch. App. 703; *Dodson v. Downey*, (1904) 2 Ch. 620.

<sup>81</sup> *Cavander v. Bulteel*, 9 Ch. 78; *Lindsay v. Gibbs*, 3 De. G. & J. 690; *Gulon v. Trask*, 1 De G. F. & J. 379.

<sup>82</sup> *Glyn v. Hood*, 1 Giff. 328.

main partnership as settled between the partners of that partnership<sup>83</sup> unless *mala fides* or mistake is shown ;<sup>84</sup> (c) he cannot call for accounts nor inspect books while the business is a going concern ;<sup>85</sup> nor interfere in the management and administration of the business ;<sup>86</sup> (d) he must indemnify his vendor against the partnership liabilities ;<sup>87</sup> (e) in case of a dissolution he is entitled to receive the share of the partnership assets to which the assignor would have been otherwise entitled, and for the purpose of ascertaining that share to an account as from the date of dissolution.<sup>88</sup> If no assent is given by the other partners to the assignment, the assignee is upon dissolution at liberty to sue for an account and for distribution, not as a partner, but as assignee of the right of his assignor in the partnership property.<sup>89</sup> His right to a judicial account cannot be affected by any account taken in arbitration according to the original agreement<sup>90</sup> nor by any agreement, subsequent to the assignment and with notice of it, between the partners for valuing and dealing with the assignor's share.<sup>91</sup> After dissolution, the assignee of a partner is not bound by any settlement of accounts entered into by the remaining partners behind his back.<sup>92</sup>

**30.** (1) A person who is a minor according to the law to which he is subject may not be a partner in a firm, but, with the consent of all the part-

Minors admitted to the benefits of partnership.

<sup>83</sup> *Bergmann v. Macmillan*, (1881) 17 Ch. D. 423.

<sup>84</sup> *Girdasingh v. Blehchand*, 60 I.C. 697 : 14 S.L.R. 193.

<sup>85</sup> *Dodson v. Downey*, (1901) 2 Ch. 620.

<sup>86</sup> Halsbury, Vol. 22, p. 58, para. 109.

<sup>87</sup> *Bergmann v. Macmillan*, (1881) 17 Ch. D. 423.

<sup>88</sup> *Chidambaram v. Karuthan*, (1916) 2 M.W.N. 18.

<sup>89</sup> *Juggut Chunder v. Radha Nath*, 10 Cal. 669.

<sup>90</sup> *Bonnin v. Neama*, (1910) 1 Ch. 732.

<sup>91</sup> *Watts v. Driscoll*, (1901) 1 Ch. 295.

<sup>92</sup> *Muthiah Chetty v. Veerappa Chetty*, 52 Mad. 509 : 1929 Mad. 627 :

121 I.C. 498 : 29 M.L.W. 636 : 1929 M.W.N. 345 : 56 M.L.J. 776. *Stevenson & Sons v. Aktiengesellschaft Fur Cartounge Industries*, (1918) A.C. 239; *Featherstonhaugh v. Fenwick*, 17 Ves. 298; *Cassels v. Stewarts*, (1881) A.C. 64; *Watts v. Driscoll*, (1901) 1 Ch. 294 rel. on.

ners for the time being, he may be admitted to the benefits of partnership.

(2) Such minor has a right to such share of the property and of the profits of the firm as may be agreed upon, and he may have access to and inspect and copy any of the accounts of the firm.

(3) Such minor's share is liable for the acts of the firm, but the minor is not personally liable for any such act.

(4) Such minor may not sue the partners for an account or payment of his share of the property or profits of the firm, save when severing his connection with the firm, and in such case the amount of his share shall be determined by a valuation made as far as possible in accordance with the rules contained in section 48 :

Provided that all the partners acting together or any partner entitled to dissolve the firm upon notice to other partners may elect in such suit to dissolve the firm, and thereupon the Court shall proceed with the suit as one for dissolution and for settling accounts between the partners, and the amount of the share of the minor shall be determined along with the shares of the partners.

(5) At any time within six months of his attaining majority, or of his obtaining knowledge that he had been admitted to the benefits of partnership, whichever date is later, such person may give public notice that he has elected to become or that he has elected not to become a partner in the firm, and such notice shall determine his position as regards the firm :

Provided that, if he fails to give such notice, he

shall become a partner in the firm on the expiry of the said six months.

(6) Where any person has been admitted as a minor to the benefits of partnership in a firm, the burden of proving the fact that such person had no knowledge of such admission until a particular date after the expiry of six months of his attaining majority shall lie on the person asserting that fact.

(7) Where such person becomes a partner,—

- (a) his rights and liabilities as a minor continue up to the date on which he becomes a partner, but he also becomes personally liable to third parties for all acts of the firm done since he was admitted to the benefits of partnership, and
- (b) his share in the property and profits of the firm shall be the share to which he was entitled as a minor.

(8) Where such person elects not to become a partner,—

- (a) his rights and liabilities shall continue to be those of a minor under this section up to the date on which he gives public notice,
- (b) his share shall not be liable for any acts of the firm done after the date of the notice, and
- (c) he shall be entitled to sue the partners for his share of the property and profits in accordance with sub-section (4).

(9) Nothing in sub-sections (7) and (8) shall affect the provisions of section 28.

**Old law** :—Section 247, Indian Contract Act, corresponds to sub-secs. (1) and (3) and sec. 248 corresponds to sub-secs. (5) and (7).

**(1) Admisson of minors with consent of all partners :**

—The principle laid down in section 11 of the Indian Contract Act and the Privy Council decision in *Mohori Bibi's case*<sup>93</sup> as to the general incapacity of an infant to enter into a contract has not been departed from in this section with reference to the law of partnership only. Hence though this section provides that a minor may be admitted to the benefits of a partnership, it does not revoke or cancel section 11 of the Contract Act.<sup>94</sup> So a minor cannot become a partner by contract,<sup>95</sup> though he may be admitted to the benefits of partnership with the consent of all the partners. "Benefits of partnership" include benefits which the minor would enjoy if he were major.<sup>96</sup> By merely being admitted to the benefits of a partnership a minor does not become a partner. It is only by his election to become a partner or by his acquiescence that he can be said to have accepted the position of a partner with all the liabilities of a partner.<sup>97</sup> Where a firm was the decreeholder and the son of the deceased partner was admitted to be entitled to a share in the decree assets, this fact did not mean that he was a partner in the firm.<sup>98</sup> If a minor is admitted to the benefits of a partnership his right is no more than a right to participate in the property of the firm

<sup>93</sup> 30 Cal. 539 P.C.

<sup>94</sup> See *Mahomed Rafiq v. Khawaja Qamar*, 67 I.C. 95 : 1922 Lah. 441.

<sup>95</sup> *Sanyasi Charan v. Krishnadhan*, 49 Cal. 560, P.C.; *Jtwan Ram v. Sita Ram*, 118 I.C. 141 Pat.; *Tulsidas v. Gangaram*, 1925 Sind 272 : 86 I.C. 944 : 18 S.L.R. 96; *In re Shaw Wallace & Co.*, 1927 Sind 18 : 97 I.C. 446 : 21 S.L.R. 208; *Muhammadi Venkattiah v. Bhoganathan*, 30 M.L.T. 228.

<sup>96</sup> *Tulsidas v. Gangaram*, 1925 Sind 272 : 86 I.C. 944 : 18 S.L.R. 96.

<sup>97</sup> See *Kakumanu v. Ramayya*, 1921 Mad. 98 : 62 I.C. 808 : 13 M.L.W. 551 : 1921 M.W.N. 100 : 40 M.L.J. 153.

<sup>98</sup> *Lal Singh v. Dhanna Singh*, 1928 Lah. 832 : 109 I.C. 50.

after its obligations have been satisfied.<sup>99</sup> The effect of a minor being taken into partnership is to make him a *cestui qui trust* and a Court of equity would enforce his rights by taking accounts. That is, though a minor cannot become a partner by contract, he can sue for partnership benefits to which he has been admitted.<sup>1</sup> Under the law as at present enacted the minor's right to sue would arise when he severs his connection with the firm.

It is clear from the sub-section that a minor can be admitted to the benefits of partnership only by express consent of the partners, and cannot be thrust upon them ; for he is a potential partner, and his introduction should be subject to the consent of all the partners in the same way as the introduction of a new adult partner.<sup>2</sup>

The question whether a minor has been admitted to the benefits of a partnership is one of fact to be pleaded and proved at the trial and cannot be allowed to be raised for the first time in appeal.<sup>3</sup>

The fact that the minor helped in the joint family business is not enough to show admission within the meaning of this section.<sup>4</sup>

**(2) Minor partner's rights :—**This sub-section sets out the rights of the minor. His rights are (i) to share the property and profits of the firm, and (ii) to inspect and copy accounts of the firm.

**(3) Liability of minors :—**According to this section the infant partner, while entitled to share the profits of the business, is not liable for the losses, except to the extent of his share in the partnership property.<sup>5</sup> And it would seem that the

<sup>99</sup> *Sanyasi Charan v. Krishnadhan*, 49 Cal. 560, P.C.; *Muhammadi Venkatiah v. Bhoganathan*, 30 M.L.T. 228; *Tulsidas v. Gangaram*, 1925 Sind 272; *In re Shaw Wallace & Co.*, 1927 Sind 18.

<sup>1</sup> *Tulsidas v. Gangaram*, 1925 Sind 272 : 86 I.C. 944 : 18 S.L.R. 96.

<sup>2</sup> Notes on Clauses.

<sup>3</sup> *Sanyasi Charan v. Krishnadhan*, 49 Cal. 560, P.C.

<sup>4</sup> See *The Official Assignee v. Palanappa*, 41 Mad. 824.

<sup>5</sup> *Rampartab v. Fooli Bai*, 20 Bom. 767; *Muhammadi Venkatiah v. Bhoganathan Venkatasubbiah*, 30 M.L.T. 228.

minor's share in the firm property is liable for its obligations, whether he has derived benefit from the business or not.<sup>6</sup> The creditors of the firm are not, therefore, entitled to proceed against the infant partner personally, being restricted only to his interest in the property of the firm.<sup>7</sup> As his share is liable for the obligations of the firm, he becomes jointly and severally liable like adult partners, though that liability is limited to his share of the partnership property.<sup>8</sup> Similarly, a minor on whose behalf an ancestral trade is carried on is not personally liable for the debts incurred in such business. The liability of such a minor is not greater than that of a minor admitted to a partnership as laid down in this section.<sup>9</sup>

An infant inheriting his father's share in a partnership business can be made liable for the personal liabilities of his father only to the extent of the assets ; and as regards the liabilities of the firm since the death of the father the minor is not personally liable, but his share only is liable.<sup>10</sup> Similarly, when a natural guardian carries on a family business belonging to a minor by a manager, the guardian and not the minor is personally liable on contract entered into in the course of the business though the assets of the business are also available for the liabilities.<sup>11</sup>

#### **Liability of minor's share of joint family property :—**

But where the manager of a joint Hindu family carries on trade in partnership with a stranger for the benefit of the family the

<sup>6</sup> *Ibid.*; *Rampartab v. Fooli Bibi*, 20 Bom. 767.

<sup>7</sup> *Sanyasi Charan v. Ashutosh*, 42 Cal. 225; *Narain Das v. Rallu Bros.*, 61 P.R. 1915; *Krishnadhan v. Sanyasi Charan*, 23 C.W.N. 500. *Jaffer Ali v. Standard Bank of South Africa*, 1928 P.C. 135 : 107 I.C. 453 : 47 C.L.J. 292 : 30 Bom. L.R. 762.

<sup>8</sup> *Krishnadhan v. Sanyasi Charan*, 23 C.W.N. 500; see also *Kakumanu v. Ramayya*, 62 I.C. 802 : 1921 Mad. 98 : 40 M.L.J. 153.

<sup>9</sup> *Khetra v. Nishi*, 22 C.W.N. 488; *Joy Kristo v. Nittyananda*, 3 Cal. 738, the guardian of a Hindu minor is competent to carry on an ancestral trade on behalf of the minor.

<sup>10</sup> *Haramohan v. Sudarson*, 25 C.W.N. 847 : 66 I.C. 811 : 1921 Cal. 538.

<sup>11</sup> *Sanka Krishnamurthi v. The Bank of Burma*, 35 Mad. 692.

liability of the minor member is not restricted to his share in the partnership assets, but arises under the Hindu law and the joint family property is liable for the debt.<sup>12</sup>

**Infant partner cannot be adjudged insolvent :—**An infant partner is not liable to be adjudicated an insolvent if it transpires that the debts of the firm cannot be satisfied out of the property of the firm. As the creditors of the firm are restricted to the interests of the minor partner in the property of the firm, if the value of such interest is not sufficient for the satisfaction of the dues of the creditors, it cannot be maintained that the infant is unable to pay his debts which must be the true foundation of all proceedings in insolvency against him.<sup>13</sup>

**Section where not applicable :—**This section is not strictly applicable where the minor is the sole owner of a firm as there is no partnership. But, by analogy, the minor would be bound by the acts of his guardian which are necessarily incidental to or flowing out of the carrying on of that trade.<sup>14</sup>

**(4) Minor's suit for account :—**This sub-section lays down the ultimate remedy of the minor admitted to the benefits of a partnership for enforcing his rights when he severs his connection with the firm, which remedy will take the form of a suit for account and payment of his share. The sub-section also safeguards the partners against being saddled with a debt which the business cannot meet by allowing them to convert the suit into one for dissolution and for accounts as between all the parties.

**(5) Personal liability on attaining majority :—**This sub-section makes it clear that on attaining majority the minor has the option of becoming a partner in the firm or of severing his connection with it. If he chooses the former, he need take no definite action, and he becomes a partner on the expiry of six months of attaining majority, or of his obtaining knowledge

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<sup>12</sup> *Dhulipalla Kanakam v. Nadiipalli Venkataraju*, (1918) M.W.N. 44.

<sup>13</sup> *Sanyasi Charan v. Ashutosh*, 42 Cal. 225, 232; foll. in *Jagmohan v. Grish Babu*, 42 All. 515.

<sup>14</sup> See *Rampartab v. Foolibai*, 20 Bom. 767, 777, 779.



that he had been admitted to the benefits of partnership, whichever date is later, and also becomes personally liable to third parties for all acts of the firm done since the date of his admission to the benefits of partnership (sub-sec. 7a). If he chooses the latter course, he can make his choice effective only by giving public notice within the same period that he has severed his connection with the firm. If he fails to give that notice third parties will be entitled to treat him as a partner.

Hence, by merely being admitted to the benefits of a partnership, a minor does not become a partner. It is only by a consentient act on the part of himself and his partners,<sup>15</sup> or by his acquiescence that he can be said to have accepted the position of a partner with all the liabilities of a partner.<sup>16</sup> There is thus a real partnership in the eye of the law after the minor attains majority and does not repudiate his admission into the partnership during his minority<sup>17</sup> within the time prescribed by the sub-section. The minor cannot repudiate the partnership by mere oral declaration<sup>18</sup> but can do so only by giving public notice under section 72.

The members of a Hindu joint family on attaining majority do not necessarily, by reason of the rule contained in this section or otherwise, become personally liable for, and liable to adjudication in respect of, debts contracted in the joint family business during their minority. The fact that the minor helped in the joint family business is not enough to show admission within the meaning of this section.<sup>19</sup>

**(6) Burden of proof :—**The burden of proof is cast on the person who asserts that the person who was admitted as a minor to the benefits of partnership had no knowledge of such admission until a particular date after the expiry of six months

<sup>15</sup> *Lutchumanen v. Siva Prokasa*, 26 Cal. 349.

<sup>16</sup> *Kakamamu v. Ramayya*, 62 I.C. 802 : 1921 Mad. 98 : 13 M.L.W. 551 : 1921 M.W.N. 100 : 40 M.L.J. 153 : 29 M.L.T. 114.

<sup>17</sup> *Ibid.*; *Krishnadhan v. Sanyasi Charan*, 23 C.W.N. 500.

<sup>18</sup> *Krishnadhan v. Sanyasi Charan*, 23 C.W.N. 500.

<sup>19</sup> See *The Official Assignee v. Palantappa*, 41 Mad. 824; *Sadasiva Ayyar, J., diss.*

of his attaining majority. He may be the person who was himself the minor when such date would be specially within his knowledge and this would be in accordance with sec. 106, Evidence Act. He may be any other person in which case the rules in secs. 101 and 103 of that Act will throw the onus on him.

**(7) Rights and liabilities on electing to be partner :—**

The rights and liabilities mentioned in this sub-section follow when a person becomes a partner in accordance with the rule mentioned in sub-section (5) either by giving public notice that he has elected to become a partner, or by his failure to give such notice within the period allowed for exercising his option. This section is primarily directed to the protection of the firm. The important point is that he becomes personally liable for all acts of the firm as if he had been a partner from the date of his admission to the benefits of partnership, and his rights and liabilities as a minor as detailed in sub-section (2) and (4) continue up to the date on which he becomes a partner which is not necessarily the date of his attaining majority but may cover some period after it. His right to sue for accounts is regulated by the rules mentioned in Chapter VI and not by sub-section (4) of this section.

This sub-section goes much further than the English law which does not make a partner admitted during minority personally liable after attaining majority except for obligations incurred after that date.

**(8) Rights and liabilities on severing connection :—**

A public notice under sec. 72 given in accordance with sub-section (5) is essential in order that the provisions of this sub-section apply. As the person severs his connection with the firm the bar to sue for accounts is removed, and his share of the property and of profits of the firm is not liable for any acts of the firm done after the date of the notice. Though he has attained majority his rights and liabilities as mentioned in sub-sections (2), (3) and (4) continue up to the date on which he gives public notice in accordance with sub-section (5).

**(9) Holding out :—**The principles of estoppel as mentioned in sec. 28 will apply notwithstanding anything contained

in sub-sections (7) and (8). Thus after attaining majority but before giving public notice of his electing not to become a partner a person may become personally liable on the ground of representing himself, or knowingly permitting himself to be represented, as a partner, in spite of any rule contained in sub-section (8) regarding his non-liability for acts of the firm.

## CHAPTER V.

### INCOMING AND OUTGOING PARTNERS.

31. (1) Subject to contract between the partners and to the provisions of section 30,

Introduction of a partner.

no person shall be introduced as a partner into a firm without the consent of all the existing partners.

(2) Subject to the provisions of section 30, a person who is introduced as a partner into a firm does not thereby become liable for any act of the firm done before he became a partner.

**Old law :—**Sub-section (1) corresponds to sub-section (6) of section 253 of the Indian Contract Act while sub-section (2) corresponds to the latter part of section 249.

**(1) Introduction of a partner—nomination :—**The general idea is that the consent of all existing partners is required to the introduction of a new partner, in order that the firm may work harmoniously. "The mutual confidence reposed by each in the other is one of the main elements in the contract (of partnership). Hence it is one of the fundamental principles of partnership law that no person may be introduced as a partner without the consent of all existing partners."<sup>20</sup> However, if a previous contract has been made by the partners

to the effect, for example, that the senior partner shall have the right of introducing a new partner at any time or juncture, the contract will be binding on the partners, even though when the time comes or juncture arises, one or more of the partners may be unwilling to accept the new partner.<sup>21</sup> The right of the person who is thus introduced will be specially enforced.<sup>22</sup> Further, the contract of partnership may provide that a third person, not a partner, shall have the right of nominating the successor of a retiring partner, and a partner thus nominated would come in as entirely by the consent of the remaining partners.<sup>23</sup>

**Sub-partnership :—**'If, however, several persons are partners and one of them agrees to share the profits derived by him with a stranger, this agreement does not make the stranger a partner in the original firm. The result of such an agreement is to constitute what is called a *sub-partnership*; that is to say, it makes the parties to it partners *inter se*; but it in no way affects the other members of the principal firm.<sup>24</sup>

**(2) Liability of a new partner for existing debts :—**This sub-section relates to the liability of a new partner for the existing debts of the firm. It makes no provision for the liability of the new partner for the future debts of the firm, as this is covered by the general provision of section 25. It also maintains the peculiar higher liability under sec. 30 (7) of the minor potential partner who elects to become a full partner.<sup>25</sup>

The rule of law laid down in this section is an extension of the general principle that partners are not liable for goods, etc., purchased on the credit of an individual adventurer previous to the contract of partnership though afterwards brought into stock as his contribution.<sup>26</sup> Further, a firm has

<sup>21</sup> Notes on Clauses.

<sup>22</sup> *Bryne v. Reid*, (1902) 2 Ch. 735.

<sup>23</sup> *Lovegrove v. Nelson*, 3 M. & K. 1.

<sup>24</sup> Lindley, p. 71.

<sup>25</sup> Notes on Clauses.

<sup>26</sup> *Karamali Abdulla v. Vera Karimji*, 39 Bom. 261 : 19 C.W.N. 337, P.C.

no separate existence apart from its members and individual partners collectively are called a firm (sec. 4) and 'when a new member is admitted he becomes one of the firm for the future, but not as from the past, and his present connection with the firm is no evidence that he ever expressly or impliedly authorised what may have been done prior to his admission.<sup>27</sup> His entry cannot amount to ratification of what the old partners have done, because at the time the act was done, it was not done on his behalf. Hence where a firm orders goods for sale and afterwards another joins in the adventure and share the profit and loss, the latter is not liable to the vendor for the price,<sup>28</sup> even though the goods were delivered after the incoming partner had joined the firm.<sup>29</sup>

It may be noted here that in cases of a continuing offer, example, an agreement to supply goods as required, each successive order is an acceptance of the offer as to the quantity ordered, and the offer and each successive order constitute a series of contracts.<sup>30</sup> On the same principle, in cases of a continuing contract to supply goods from time to time on certain terms, there is a series of contracts so that each delivery and acceptance raises a tacit promise to pay on the old terms. Hence if certain instalments are delivered after the introduction of a new partner, he would be liable to pay for those instalments.<sup>31</sup>

Though a newly admitted partner does not ordinarily become liable for the existing debts, the rule has no application to a case where, by the understanding between the parties, a person admitted as a partner becomes entitled to the profits and liable for the debts accruing to, and incurred by, the firm before his admission.<sup>32</sup> But where there is no contract with the new partners taken in the place of the retiring partners

<sup>27</sup> Lindley, p. 273.

<sup>28</sup> *Young v. Hunter*, 4 Taunt 582.

<sup>29</sup> *Whitehead v. Barron*, 2 Moo. & R. 248.

<sup>30</sup> *The Bengal Coal Co. v. Homoe Wadia & Co.*, 24 Bom. 97, 102.

<sup>31</sup> See *Dyke v. Brewer*, 2 Car. & Kir. 828.

<sup>32</sup> *Rolfe v. Flower*, L.R. 1 P.C. 27; *Shewak Mahdon v. Joseph*, 9 C.L.R. 21.

the new partners cannot be made liable for the antecedent debts though the old partners may agree among themselves to be jointly and severally liable. Further, apart from privity, a creditor of a firm is not entitled to rely on an agreement between the partners, and when persons entering into partnership agree to become liable for the antecedent debts of the firm, such agreement cannot be enforced by the creditor on the strength of the contract between the partners.<sup>33</sup> Thus a person who, on joining a firm, becomes entitled, as between himself and the firm, to the rights of a partner from past date cannot be sued for goods supplied to the firm between such past date and the time when he joined the firm.<sup>34</sup>

When a person is admitted as a partner into an existing firm he becomes liable for any debt incurred prior to his admission (1) if the firm as constituted after his admission has assumed the liability to pay the old debts and (2) if the creditor has agreed to accept the new firm as his debtors and to discharge the old partnership from its liability.<sup>35</sup> An incoming partner is subject to the terms of the partnership, except as varied by express agreement, though he may not be bound by a special term of which he had no notice.<sup>36</sup>

### 32. (1) A partner may retire—

Retirement of a partner.

- (a) with the consent of all the other partners,
- (b) in accordance with an express agreement by the partners, or
- (c) where the partnership is at will, by giving notice in writing to all the other partners of his intention to retire.

### (2) A retiring partner may be discharged from any

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<sup>33</sup> *R. E. Works v. Kanara Transport Co.*, 49 Mad. 930 : 1926 Mad. 1138 : 98 I.C. 257 : 1926 M.W.N. 825 : 51 M.L.J. 506 : 24 M.L.W. 546.

<sup>34</sup> *Wilsford v. Wood*, (1794) 1 Esp. 182.

<sup>35</sup> *P. D. Sarma v. Phanindra*, 35 C.W.N. 593.

<sup>36</sup> *Austen v. Boys*, (1857) 24 Beav. 598, 606. Halsbury, Vol. 22, p. 52, para. 98.

liability to any third party for acts of the firm done before his retirement by an agreement made by him with such third party and the partners of the reconstituted firm, and such agreement may be implied by a course of dealing between such third party and the reconstituted firm after he had knowledge of the retirement.

(3) Notwithstanding the retirement of a partner from a firm, he and the partners continue to be liable as partners to third parties for any act done by any of them which would have been an act of the firm if done before the retirement, until public notice is given of the retirement :

Provided that a retired partner is not liable to any third party who deals with the firm without knowing that he was a partner.

(4) Notices under sub-section (3) may be given by the retired partner or by any partner of the reconstituted firm.

**Old law** :—Clause (a) of sub-section (1) contains the principle of sub-section (9) of sec. 253 of the Indian Contract Act and clause (c) that of sub-section (8).

**Retirement of a partner** :—In this section the word 'retire' is properly confined to cases where a partner withdraws from a firm and the remaining partners continue to carry on the business of the firm without dissolution of partnership as between them. It does not cover the case where a partner withdraws from a firm by dissolving it, which has been referred as a dissolution and not as a retirement.

According to Lindley, the right of a partner to retire is very restricted.<sup>37</sup> He mentions three general rules as to retiring. (i) It is competent for a partner to retire with the consent of his co-partners at any time and upon any terms ;

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<sup>37</sup> Notes on Clauses.

(ii) It is competent for him to retire without their consent by dissolving the firm, if he is in a position to dissolve it.

(iii) It is not competent for a partner to retire from a partnership which he cannot dissolve, and from which his co-partners are not willing that he should retire.<sup>38</sup> This section appears to widen the right as set out in Lindley's three rules, but in fact it does so to a very small extent. Clause (a) corresponds with Lindley's first rule, and covers cases where a partner is allowed to retire at any time on an amicable arrangement then made with his partners. Clause (b) appears to be new, but it is probably included in Lindley's first rule. It covers cases where the retirement is made in pursuance of a previous arrangement consented to by all, as is frequently done in articles of partnership. Here, however, at the time the retirement occurs, the partner has the right to retire whether or not his co-partners are still agreeable. Clause (c) is merely a very slight extension of the right of a partner to dissolve a partnership at will by notice (*vide* sec. 43). This section softens to some extent the hard rule laid down by Lindley on page 697 that "there is only one method by which a partner can retire from a firm without the consent of his co-partners, and that is by dissolving the firm." According to the English rule, where no term is expressly limited for its duration, and there is nothing in the contract to fix it, the partnership may be terminated at a moment's notice by either party. By that notice the partnership is dissolved to this extent, that the Court will compel the parties to act as partners in a partnership existing only for the purpose of winding up the affairs.<sup>39</sup> But this section will allow a partner in a partnership at will to retire from the firm without dissolving it, if he has no claim against the firm or thinks his claim will be settled amicably without a winding up. His right to dissolve the firm, if he considers that to be the better course, is unimpaired.<sup>40</sup>

It may be noted that an agreement to determine a partner-

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<sup>38</sup> Lindley, p. 698.

<sup>39</sup> *Crawshay v. Maule*, (1818) 1 Swanst. at p. 508.

<sup>40</sup> Notes on Clauses.



ship "by mutual agreement" creates a sufficient fixed term, namely, the joint lives of the partners, and therefore a partner could not retire by merely giving notice to the other partners.<sup>41</sup>

**(2) Discharge of the retiring partner from previous liability** :—This is a very important provision regarding the liability of a retiring partner to third parties for acts of the firm done before the retirement. The general principle is that in order to extinguish the liability of a debtor and substitute that of another instead, it is essential that the creditor should be a consenting party, and a creditor cannot in any way be prejudiced or benefited by any arrangement between the debtor and a third party by which the latter undertakes the liability of the former. The result is that if the creditor is not a consenting party to the arrangement neither is he compellable to look to the transferee for payment nor is he entitled to compel the transferee to satisfy his dues. On the same principle, if after the retirement of a partner, the old partners either alone or with a new partner agree among themselves to take the liabilities of the old firm, neither the liability of the retiring partner nor the right of the creditor to obtain payment from the old partners including the retiring partner is in any way affected because he was not a consenting party.<sup>42</sup> Hence an agreement by continuing partners to indemnify a retiring partner against the partnership debts does not extinguish the joint liability of the partners to creditors, although, as between the partners, the retiring partner is in the position of a surety.<sup>43</sup> Lindley considered the effect of numerous cases and laid down the following rules from them: (1) "An express agreement by the creditor to discharge a retired partner, and to look only to a continuing partner, is not inoperative for want of consideration."<sup>44</sup> (2) "An adoption by the creditor of the new firm as his

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<sup>41</sup> *Moss v. Elphick*, (1910) 1 K.B. 846.

<sup>42</sup> *Smith v. Jameson*, 5 T.R. 601; *Rodgers v. Maw*, 4 Dowl. & L. 66; *Dickenson v. Lockyer*, 4 Ves. 36; *Cummins v. Cummins*, 8 Ir. Eq. 723.

<sup>43</sup> *Rodgers v. Maw*, (1846) 4 Dow. & L. 66. Halsbury, Vol. 22, p. 37, para. 69.

<sup>44</sup> *Lodge v. Ducas*, 3 B. & A. 611 has, as to this point, been overruled by *Thompson v. Percival*, 5 B. & Ad. 925.

debtor. does not by any means necessarily deprive him of his rights against the old firm either at law<sup>45</sup> or in equity.<sup>46</sup> (3) "And it will certainly not do so if, by expressly reserving his rights against the old firm, he shows that by adopting the new firm he did not intend to discharge the old firm."<sup>47</sup> (4) "And by adopting a new firm as his debtor, a creditor cannot be regarded as having intentionally discharged a person who was a member of the old firm, but was not known to the creditor so to be."<sup>48</sup> (5) "But the fact that the creditor has taken from a continuing partner a new security for a debt due from him and a retired person jointly, is strong evidence of an intention to look only to the continuing partner for payment."<sup>49</sup> (6) "And a creditor who assents to a transfer of his debt from an old firm to a new firm, and goes on dealing with the latter for many years, making no demand for payment against the old firm, may not unfairly be inferred to have discharged the old firm."<sup>50</sup> The retiring partner, including a sleeping partner<sup>51</sup> remains liable until the partnership affairs are wound up or the liabilities are discharged either by payment or by novation in which the creditor is a party, which may be either express or inferred from the course of dealing between the creditors and the new firm after they had knowledge of the retirement.

### (3) Continuance of liability until public notice :—

Continuance of liability for acts of partners done after dissolution until public notice is given has been defined in sec. 45. This sub-section is confined to the case of retirement and covers

<sup>45</sup> *David v. Ellice*, 5 B. & C. 196; *Thompson v. Percival*, 5 B. & Ad. 925; *Heath v. Percival*, 1 P.W. 682; *Kirwan v. Kirwan*, 2 Cr. & M. 617; *Gough v. Davies*, 4 Price, 200; *Blew v. Wyatt*, 5 C. & P. 397.

<sup>46</sup> *Oakford v. European etc Ship Co.*, 1 Hem. & M. 182; *Sleech's case*, 1 Mer. 539; *Palmer's case*, ib. 623; *Brathwaite v. Britain*, 1 Keen. 206; *Winter v. Innes*, 4 M. & Cr. 101.

<sup>47</sup> *Bedford v. Deakin*, 2 B. & A. 210; *Jacomb v. Harwood*, 2 Ves. S. 265.

<sup>48</sup> *Robinson v. Wilkinson*, 3 Price 538.

<sup>49</sup> *Evans v. Drummond*, 4 Esp. 89; *Reed v. White*, 5 ib. 122.

<sup>50</sup> *Lindley*, pp. 325, 326.

<sup>51</sup> *Court v. Berlin*, (1897) 2 Q.B. 396, C.A.

the liability of the retired partner for acts of the firm, and the liability of the firm for acts of the retired partner. 'The authority imputed to each partner must continue until some event happens to put an end to it, and is made known to those who deal with him. The same reason which leads to the imputation of the power to act for the firm at all demands that such power shall be imputed so long as it can be exercised and is not known to have been determined.'<sup>52</sup> Thus though retirement will have the effect of revocation of authority to act for the retiring partner, still the power of each partner to bind the retiring partner remains until the retirement is notified, and he will be liable to a third party, e.g., for a pro. note executed by his late partner after his retirement; even though the creditor had no previous dealings with the firm.<sup>53</sup> So where after the retirement of a partner another person comes in his place and the firm continues under the old name, a customer who deals with the firm after the change and without notice of it may hold liable either the old partners or the new firm at his choice though not the new firm and the retiring partner jointly.<sup>54</sup> On the same principle, the liability for torts committed by the old partners or their agents after the retirement continues until due notice is given.<sup>55</sup>

**Dormant partner** :—But with regard to a dormant partner the rule is different. It has been said that "a dormant partner may retire from a firm without giving notice to the world."<sup>56</sup> The reason is that the dormant partner was not known to the creditor at the time when he had dealings with the firm and therefore no credit was given to him.<sup>57</sup> But, on the other hand, if the dormant partner was known at the time to be a member

<sup>52</sup> Lindley, p. 279.

<sup>53</sup> See Lindley, p. 281; *Parkin v. Carruthers*, 3 Esp. 248; *Williams v. Keats*, 2 Stark. 290; *Brown v. Leonard*, 2 Chitty 120.

<sup>54</sup> *Scarfe v. Jardine*, (1882) (H.L.) 7 App. Ca. 345.

<sup>55</sup> *Stables v. Eley*, 1 Car. & P. 614.

<sup>56</sup> *Per Patteson, J., Heath v. Sansom*, (1832) 4 B. & Ad. 173.

<sup>57</sup> See *Carter v. Whalley*, 1 B. & Ad. 11.

of the firm, notice of his retirement is necessary to avoid future responsibility.<sup>58</sup>

**Liability to new creditors :—**The liability of the retired partner is based on the principle of estoppel by holding out or representation but “the representation is a continuing one as regards persons who have dealt with the old firm unless and until such notice is given, but not as regards new customers or creditors who never knew that he was a partner.”<sup>59</sup>

**Liability by holding out after notice :—**On the other hand, although a notice of retirement is given and liability for further acts would not ordinarily arise, the retiring partner may be liable for such acts on the principles of holding out, *e.g.*, when he does not prevent the continued use of his name and his name is used by his authority.<sup>60</sup> Similarly, where the persons who intended to retire from the business did in fact continue to associate with its work, a presumption may legitimately be drawn in favour of the continuance of the partnership.<sup>61</sup>

**Notice :—**As regards giving notice to customers, the English law is that separate notices must be given to old customers but public notice to new customers is sufficient. This may be a serious undertaking for a partner leaving a firm which deals with numerous customers in India, and therefore separate notices to old customers have been dispensed with, and public notice has been made sufficient in all cases.<sup>62</sup> As regards the nature of public notice, see section 72.

**33. (1)** A partner may not be expelled from a firm by any majority of the partners, save in the exercise in  
Expulsion of a partner.

<sup>58</sup> *Farrar v. Deftine*, 1 Car. & K. 580.

<sup>59</sup> Halsbury, Vol. 22, p. 15, para. 21 citing *Ex parte Watson*, (1815) 19 Ves. 459, 461; *Waugh v. Carver*, (1793) 2 Hy. & Bl. 235; *Scarf v. Jardine*, (1882) 7 App. Cas. 345, 349, 356; *Newsome v. Coles*, (1811) 2 Camp. 617; *Williams v. Keats*, (1817) 2 Stark. 290.

<sup>60</sup> See *Williams v. Keats*, 2 Stark. 290.

<sup>61</sup> *Pulln v. Mahendra*, 34 C.L.J. 405 : 1921 Cal. 722 : 67 I.C. 10.

<sup>62</sup> Notes on Clauses.

good faith of powers conferred by contract between the partners.

(2) The provisions of sub-sections (2), (3) and (4) of section 32 shall apply to an expelled partner as if he were a retired partner.

**(1) Expulsion of a partner :—**As stated before, [see sec. 12 (c)] the power of majority to bind minority is not absolute and it is in all cases subject to the condition that it should be exercised in good faith though there may be an express provision dispensing with the necessity of giving reasons by the majority.<sup>63</sup> In order to expel a partner preliminary warnings,<sup>64</sup> reasonable opportunity of explanation<sup>65</sup> and of meeting the case against him<sup>66</sup> must be given, though it is not so where the power is vested in one partner as the sole judge.<sup>67</sup>

An agreement empowering one of the partners to determine the partnership by notice if he were dissatisfied with the conduct or the results of the business is not analogous to expulsion.<sup>68</sup> There is no dissolution of partnership when one partner expels the other.<sup>69</sup>

An injunction may be granted when one member of a Hindu family is prevented from taking part in the business of the firm.<sup>70</sup>

A partner improperly expelled may sue for reinstatement as a partner,<sup>71</sup> but he cannot sue for damages as such expulsion is void and of no effect.<sup>72</sup>

**(2) Position of expelled partner :—**Sub-section (2) places an expelled partner on precisely the same footing as a retired

<sup>63</sup> *Blisset v. Daniel*, 10 Ha. 493; *Wood v. Wood*, L.R. 9 Ex. 190.

<sup>64</sup> *Barnes v. Youngs*, (1898) 1 Ch. 414.

<sup>65</sup> *Wood v. Wood*, L.R. 9 Ex. 190; *Blisset v. Daniel*, 10 Ha. 439.

<sup>66</sup> *Barnes v. Youngs*, (1898) 1 Ch. 414; *Hem Das v. Kunj Behari*, 110 I.C. 500 : 1928 Oudh 424.

<sup>67</sup> *Russel v. Russel*, (1880) 14 Ch. D. 471.

<sup>68</sup> *Russel v. Russel*, (1880) 14 Ch. d. 471.

<sup>69</sup> *Dwarka Das v. Chuni Lal*, 12 C.W.N. 455.

<sup>70</sup> *Ganpat v. Annapit*, 23 Bom. 144.

<sup>71</sup> *Blisset v. Daniel*, 10 Ha. 493.

<sup>72</sup> *Wood v. Wood*, L.R. 9 Ex. 190.

partner as regards his liabilities for existing and future debts of the firm.

**34. (1)** Where a partner in a firm is adjudicated an insolvent he ceases to be a partner on the date on which the order of adjudication is made, whether or not the firm is thereby dissolved.

(2) Where under a contract between the partners the firm is not dissolved by the adjudication of a partner as an insolvent, the estate of a partner so adjudicated is not liable for any act of the firm and the firm is not liable for any act of the insolvent, done after the date on which the order of adjudication is made.

**(1) Insolvency of a partner :—**Sub-section (1) states the principle that the insolvency of a partner severs his connection with the firm. The English Act antedates the dissolution back to the act of bankruptcy, but in this section the date of adjudication has been selected as the date on which the insolvent ceases to be a partner.

Under sec. 254 (2) of the Indian Contract Act, insolvency of a partner was a ground for dissolution of the partnership at the suit of a partner, and insolvency itself did not dissolve a partnership. Therefore a partnership which was entered into on the 9th November, 1903, for five years was held to run till 8th November, 1908, though one of the partners became insolvent on the 27th March, 1907.<sup>73</sup> But under this Act a firm is dissolved by the adjudication of a partner as an insolvent unless there is a contract to the contrary, [see sec. 42 (d)], but a firm is compulsorily dissolved by the adjudication of all the partners or of all the partners but one as insolvent, [see sec. 41 (a)].

**Insolvency proceedings against partners or firm :—**Any creditor whose debt is sufficient to entitle him to present

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<sup>73</sup> *Abu Backer v. Rahim*, (1910) M.W.N. 789; *Harnamdas v. Firm Mayadas*, 1925 Sind 310; *Firm of Nichal Singh v. Firm Vishenji*, 1926 Sind 71.

an insolvency petition against all the partners in a firm may present a petition against one or more partners in the firm without including the others (sec. 95, Presy.-towns Ins. Act). Where two partners are liable to a creditor under a joint debt and each of them is alleged to have committed acts of bankruptcy during the continuance of the joint debt a single petition for adjudging both of them as insolvents is sustainable.(a)

An adjudication order may be made against a firm in the firm name (sec. 99, Presy.-towns Ins. Act), though the firm is dissolved if the debts of the firm have not been paid.(b) Though there is no corresponding provision in the Provincial Insolvency Act, rules of the High Court under sec. 79 (2) (c) contain the procedure where the debtor is a firm. An order of adjudication can be made against a firm in the firm name.(c)

A petition by a firm may be presented in the name of the firm (see sec. 99 Presy.-towns Ins. Act), but where a firm of debtors files an insolvency petition the same shall contain the names in full of the individual partners, and if such petition is signed in the firm name, the petition shall be accompanied by an affidavit made by the partner who signs the petition showing that all the partners concur in the filing of the same.(d)

**Vesting order—position of official Assignee or Receiver** :—On the bankruptcy of one only of several partners, the insolvent's share in the partnership will vest in the Official Assignee or Receiver, but the joint assets do not vest in the Official Assignee or Receiver who, with the solvent partners, becomes a tenant in common of the property of the firm (e) and not a co-partner with them. His right would be the same

(a) *Alamurt Punnliah v. Sagarafee*, 50 Mad. 256 : 1927 Mad. 124 : 99 I.C. 185.

(b) *Gokuldoss v. Parry & Co.*, 48 Mad. 795 : 91 I.C. 127 : 1925 Mad. 1249.

(c) *Mohammad Umar v. Off. Receiver*, 1929 All. 447 : *contra Kall Charan v. Hari Mohan*, 24 C.W.N. 461, a case under the old Act in which there was no provision for making rules.

(d) Calcutta rule 150; Bombay rule 153; Madras rule 45.

(e) See *Sanyasi Charan v. Asutosh*, 42 Cal. 225, 236, 237.

as that of the bankrupt partner had he not become bankrupt and subject to the same obligations. Thus the right to take the bankrupt's share is subject to the payment of all the joint creditors (see sec. 49), (f) and subject to every lien available for the bankrupt's co-partners against him (see secs. 49 and 52). The mutual rights of the Official Assignee and the solvent partners are to have an account and a sale and distribution. (g)

Where after dissolution of a partnership by the death of a partner, the sole surviving partner becomes insolvent, the interest of the latter vests in the Official Assignee subject to the obligation of the surviving partner to wind up the partnership (sec. 47). Hence the rights incidental to such obligation, *e.g.*, the right to realise the partnership assets and do all things necessary to wind up the partnership also vests in the Official Assignee. (h)

Where after a suit has been instituted by a partner for dissolution of partnership and rendition of accounts, he is adjudicated as an insolvent, the suit cannot be continued except at the instance of the Receiver. (i) Under sec. 98 of the Presidency-towns Insolvency Act the Court may authorise the Official Assignee to continue or commence any suit in his own name and that of the insolvent's partner, and any release by the partner is void. (j).

The Official Assignee cannot, however, take possession of the goods of the partnership without the consent of the other partner or partners in whose possession they may happen to be. (j) It is not open to the Court to direct the receiver in insolvency to deal with assets other than those belonging to the persons who have been adjudicated insolvents. (k)

(f) See *Ma Thwe v. Munshi Ram*, 131 I.C. 62 : 1931 Rang. 191.

(g) *Crawshaw v. Collins*, 15 Ves. 229; *Wilson v. Greenwood*, 1 Swanst. 471; see Lindley, p. 796 *et seq.*<sup>e</sup>

(h) *Ad. Gen., Madras v. Off. Assignee*, 32 Mad. 462.

(i) *Tulsi Ram v. Dina Nath*, 1926 Lah. 145 : 89 I.C. 333.

(j) *Wilson v. Nathumull*, 1930 Mad. 458 : 31 M.L.W. 339.

(k) *Sanyasi Charan v. Asutosh*, 42 Cal. 225, 235, 236; *Lovell and Christmas v. Beauchamp*, (1894) A.C. 607 explained.



**(2) No liability after adjudication** :—Sub-section 2 contains two rules: (i) It lays down that the estate of the insolvent is not liable for any act of the firm done after the date of adjudication. This rule is justified by the general consideration that the adjudication of the insolvent is a notorious event and no further notice thereof is required either to old or to new customers of the firm. (ii) It also contains the complementary rule that the firm is not bound by the acts of the insolvent done after the date of adjudication.<sup>74</sup> The reason is that on the bankruptcy of a partner his authority ceases and he cannot bind the firm by his acts. Thus if he indorses in the name of the firm a bill belonging to the partnership, the indorsee acquires no property in the bill.<sup>75</sup> But if notwithstanding the bankruptcy of one partner the others hold themselves out as still in the partnership with him, they will be liable for his acts, as if he and they were partners.<sup>76</sup>

**35.** Where under a contract between the partners the firm is not dissolved by the death of a partner, the estate of a deceased partner is not liable for any act of the firm done after his death.

**Old law** :—This section corresponds to sec. 261 of the Indian Contract Act.

**Liability of deceased partner's estate** :—This section is confined to the case where the firm continues without dissolution. Where dissolution has occurred, these matters are provided for in sections 45 and 47.

This section is an extension of the general principle that the authority of an agent terminates with the death of the principal (sec. 201, Indian Contract Act). Where the surviving partners of a banking firm continue the business under the same firm after the death of a partner, and the firm becomes insolvent, the estate of the deceased partner is liable to the

<sup>74</sup> Notes on clauses.

<sup>75</sup> *Thomason v. Frere*, 10 East 418.

<sup>76</sup> See *Lacy v. Woolcott*, 2 Dowl. & Ry, 458; Lindley, p. 283.

customers of the bank for liabilities incurred before his death,<sup>77</sup> but not for those incurred after his death.<sup>78</sup> In such cases notice of his death is immaterial,<sup>79</sup> and so it is immaterial if the customer believed the deceased to be still living and a member of the firm.<sup>80</sup> But 'it does not follow that because a creditor has no remedy against the estate of a deceased partner in respect of debts contracted by his co-partners since his death, his estate is not liable to contribute to such debts at the suit of the surviving partners. That is a different matter altogether, and depends on the agreement into which he entered with his co-partners'.<sup>81</sup>

**36. (1)** An outgoing partner may carry on a business competing with that of the firm and he may advertise such business, but, subject to contract to the contrary, he may not—

Rights of outgoing partner to carry on competing business.

- (a) use the firm name,
- (b) represent himself as carrying on the business of the firm, or
- (c) solicit the custom of persons who were dealing with the firm before he ceased to be a partner.

**(2)** A partner may make an agreement with his partners that on ceasing to be a partner he will not carry on any business similar to that of the firm within a specified period or within specified local

Agreements in restraint of trade.

<sup>77</sup> *Devaynes v. Noble*, 1 Mer. 529; *Sleech's case*, 1 Mer. 539; *Clayton's case*, 1 Mer. 572.

<sup>78</sup> *Brice's case*, 1 Mer. 622; *Mulchand v. Maneck Chand*, 8 Bom. L.R. 8.

<sup>79</sup> *Houlton's case*, 1 Mer. 161; *Johnes' case*, 1 Mer. 619; *Brice's case* 1 Mer. 620; *Webster v. Webster*, 3 Swanst, 490.

<sup>80</sup> *Houlton's case*, 1 Mer. 616.

<sup>81</sup> *Lindley*, p. 282.

limits; and, notwithstanding anything contained in section 27 of the Indian Contract Act, 1872, such agreement shall be valid if the restrictions imposed are reasonable.

**(1) Rival business by outgoing partners:—**This section relates to restrictions which are imposed on the activities of outgoing partners, in order to prevent unfair competition with the firm. Sub-section (1) presents some points of interest. The typical and most frequent case is that of a partner who retires from the firm. He has received presumably, payment for the value of his share in the property of the firm, and his property includes the goodwill of the business. A retiring partner, therefore, may be regarded as having sold his share of the goodwill of the business along with his share in the other assets to his fellow partners. He is *vis-a-vis* his partners in the same position as a person who sells the goodwill of his business to another. Similar considerations would apply to an expelled partner, for, though he may have left the firm unwillingly, he either has no claim against the firm or receives some payment in liquidation. Similar considerations apply also to a partner who is adjudicated insolvent, for though he does not receive the value of his share, his estate does. The rules contained in this sub-section, therefore, are a statement of the chief judicial rulings on the subject of the sale of goodwill, narrowed to the particular application where a partner sells, or is deemed to sell, his share of the goodwill to his fellow partners.<sup>82</sup> But though the outgoing partner may carry on the business competing with that of the firm and advertise the fact<sup>83</sup> he must not hold himself out as continuing the business which he has sold, and must not, therefore, carry it in the name in which it was carried on before he sold it.<sup>84</sup> At the same time, if that name happens to be his own, he cannot be restrained

<sup>82</sup> Notes on clauses; see also *Crutwell v. Lye*, 17 Ves. 335; *Harrison v. Gardner*, 2 Madd. 198; *Kennedy v. Lee*, 3 Mer. 455; *Shackle v. Baker*, 14 Ves. 468; *Lindley*, pp. 535, 536.

<sup>83</sup> *Hookham v. Pottage*, 8 Ch. 91; *Labouchere v. Dawson*, 13 Eq. 322.

<sup>84</sup> *Churton v. Douglas*, Johns. 174; *Hookham v. Pottage*, 8 Ch. 91.

from carrying on the business in his own name, though he may be restrained from making a dishonest use of it.<sup>85</sup> In any case he must not solicit the custom of persons who were dealing with the firm before he ceased to be a partner.<sup>86</sup>

**(2) Agreements in restraint of trade :—**This sub-section modifies the rule contained in the opening passage of sub-section (1) whereby the right is given to a retiring partner to carry on the business competing with that of the firm. It is derived from the second exception of sec. 27 of the Indian Contract Act which has been repealed. The restrictions in order to be binding must be reasonable, regard being had to the nature of the business and to its duration before dissolution. Thus a covenant by a partner while selling his share in partnership in running coaches between two places not to run any coaches between those places is enforceable.<sup>87</sup> Further, an agreement not to continue in the trade may be implied from other agreement, *e.g.*, the articles of partnership.<sup>88</sup> Mere sale of goodwill was enough for an injunction restraining the seller from setting up business in the name of the old firm holding out that he was carrying on the business in continuation of, or in succession to, the old business.<sup>89</sup>

**37.** Where any member of a firm has died or otherwise ceased to be a partner,

Right of outgoing partner in certain cases to share subsequent profits.

and the surviving or continuing partners carry on the business of the firm with the property of the firm without any final settlement of accounts as between them and the outgoing partner or his estate, then, in the absence of a contract to the contrary, the outgoing partner or his estate is entitled at the option of himself or his representatives to such share of the

<sup>85</sup> See *ibid.*, Lindley, p. 537.

<sup>86</sup> *Hookham v. Pottage*, 8 Ch. 91; *Labouchere v. Dawson*, 13 Eq. 322.

<sup>87</sup> *Williams v. Williams*, 2 Swanst. 253.

<sup>88</sup> *Cooper v. Watson*, 3 Dougl. 413.

<sup>89</sup> *Churton v. Douglas*, Johns. 174.

profits made since he ceased to be a partner as may be attributable to the use of his share of the property of the firm or to interest at the rate of six per cent. per annum on the amount of his share in the property of the firm :

Provided that where by contract between the partners an option is given to surviving or continuing partners to purchase the interest of a deceased or outgoing partner, and that option is duly exercised, the estate of the deceased partner, or the outgoing partner or his estate, as the case may be, is not entitled to any further or other share of profits; but if any partner assuming to act in exercise of the option does not in all material respects comply with the terms thereof, he is liable to account under the foregoing provisions of this section.

**Change in law :—**The rule of law contained in sec. 241 of the Indian Contract Act has been elaborated in this section as that section did not touch the question as to what right the retiring partner or the representatives of the deceased partner can claim by reason of the user of the property when there has been no agreement regarding it.<sup>90</sup>

**Retiring partner's right to profits or interest when no adjustment :—**This section defines the right of the outgoing partner or his representative where the surviving or continuing partners carry on the business of the firm without any final settlement of accounts. The right to the share of profits made since he ceased to be a partner or to interest on the amount of his share in the property of the firm is primarily governed

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<sup>90</sup> *Ramakrishna v. Muthiasami*, 52 Mad. 672 : 1929 Mad. 456 : 121 I.C. 609. Cases under the old section which held that the amount due to the deceased is a loan and nothing more are not now good law in view of the change of law. (*Hajee Siddick v. Mahomedan Hushum*, 4 L.W. 521, not approved in *Ramakrishna v. Muthiasami*, 52 Mad. 672; *Jamsetji Nassarwanji v. Hirjibhai Navroji*, 37 Bom. 158.

by the agreement between them. Where there is no such agreement, compensation to the owner for the use of his property is the object in view and it is possible that the user of property has produced no profit or a profit which is less than the current rate of interest, and so the matter is left to the choice of the outgoing partner or to the representative of the deceased partner. His final selection as to whether he chooses interest or share in the property must be postponed until accounts have been taken and for him to be entitled to claim profits it is not necessary that the whole of partnership assets are used but he can claim profits even where only a portion of such assets are used.<sup>91</sup> But in any case he is not entitled to both.<sup>92</sup> There must be an election. 'A claim for profits as to part of the time over which the dealing extends, and interest as to the other part, or for profits against some or one of the surviving partners, and interest against others, cannot be allowed.'<sup>93</sup> Acceptance of interest bars a claim to take a share of profits.<sup>94</sup>

There is a different class of cases which Lindley describes as 'mixed and difficult' in which a trustee has improperly employed the trust property in a trade carried on by himself in partnership with others who are not trustees. Apparently the profits are accretions to the trust property and he would be accountable for his own share of such profits.<sup>95</sup> As regards the other partners who are not trustees, 'if they have traded with the trust money knowing that its employment in trade was a breach of trust, they incur the same liabilities in respect of it as if they were themselves trustees. Consequently they become jointly and severally liable as well for the trust property itself as for the profits which they have made by it.'<sup>96</sup>

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<sup>91</sup> *Ramakrishna v. Muthusami*, 52 Mad. 672 : 1929 Mad. 456 : 121 I.C. 609 : 29 M.L.W. 560 : 56 M.L.J. 657.

<sup>92</sup> *Heathcote v. Hulme*, 1 Jac. & W. 122.

<sup>93</sup> *Vyse v. Foster*, L.R. 7 H.L. 318, 336; *Pollock*, p. 140.

<sup>94</sup> *Smith v. Everett*, (1859) 27 Beav. 446.

<sup>95</sup> See *Vyse v. Foster*, L.R. 7 H.L. 318; *Laird v. Chilson*, 30 Scottish Jur. 582.

<sup>96</sup> *Flockton v. Bunning*, 8 Ch. 323.

But this liability cannot be enforced except in an action to which they are all parties'.<sup>97</sup> If they are not personally implicated in any breach of trust, they are under no liability in respect of the profits in question—indeed, they may not even be liable to make good the trust money.<sup>98</sup>

**Proviso** :—Where provision was made in the articles of a partnership that the survivor may carry on the business with the representative or nominee of the deceased after entering into a new article of partnership taking an increased share in the profits, at the same time paying for the part of the deceased's interest taken over and giving securities to his representatives, the survivor is bound to account for subsequent profits to the estate of the deceased, if he, without fulfilling the provisions, carries on the business.<sup>99</sup> In case of exercise of the option by the surviving partner where the valuation of the deceased partner's share is delayed, the executors of the deceased partner are entitled to a share of profits for the period between the death and the date of valuation and to interest on the amount of valuation after that date, though compensation to the surviving partner will be allowed for his work.<sup>1</sup>

**Interest** :—The English standard rate of interest is 5 per cent. but the Indian standard of 6 per cent. has been maintained.

**38.** A continuing guarantee given to a firm, or to a third party in respect of the transactions of a firm, is, in the absence of agreement to the contrary, revoked as to future transactions from the date of any change in the constitution of the firm.

**Old law** :—This section corresponds to sec. 260 of the Indian Contract Act.

<sup>97</sup> See *Vyse v. Foster*, L.R. 7 H.L. 318; *Latrd v. Chisholm*, 30 Scottish Jur. 582; *Simpson v. Chapman*, 4 De G. M. & G. 174; *Lindley*, p. 709.

<sup>98</sup> *Lindley*, p. 709.

<sup>99</sup> *Willet v. Blanford*, 1 Ha. 253.

<sup>1</sup> *Yates v. Pinn*, (1880) 13 Ch. D. 839, 841; *Brown v. De Tastet*, (1821) Jac. 284.

**Revocation of continuing guarantee by change in the firm** :—The reason of the section is the protection of the surety against alteration of risk consequent on a change in the constitution of the firm by the death<sup>2</sup> or the retirement<sup>3</sup> of a partner, or by the introduction of a new partner.<sup>4</sup> On the same principle, where a person stands surety to firm N for the conduct of a certain person employed as a cash-keeper to the firm, the surety will not be liable for the defalcations of the cash-keeper subsequent to the change of the firm of N into that of N & Son.<sup>5</sup>

But if, by necessary implication of the nature of the firm, the surety clearly contemplated changes in the firm and agreed to stand surety to a fluctuating body, his liability is not discharged by any change among the members.<sup>6</sup>

This section is subject to the agreement between the surety and the creditor, but such an agreement cannot be inferred from the mere fact that the liability is one of indefinite continuance, *e.g.*, where a guarantee is given for moneys which 'at any time may become due'.<sup>7</sup>

## CHAPTER VI.

### DISSOLUTION OF A FIRM.

#### 39. The dissolution of partnership between all the partners of a firm is called the "dissolution of the firm."

Dissolution of a firm.

<sup>2</sup> *Holland v. Teed*, 7 Ha. 50; *Strange v. Lee*, 3 East, 484; *Weston v. Burton*, 4 Taunt 673; *Pemberton v. Oakes*, 4 Russ. 154; *Simson v. Cooke*, 1 Bing. 452; *Chapman v. Beckington*, 3 Q.B. 703; *Backhouse v. Hall*, 6 N.R. 98 Q.B.

<sup>3</sup> *Myres v. Edge*, 7 T.R. 254; *Dry v. Devey*, 10 A. & E. 30.

<sup>4</sup> *Wright v. Russel*, 2 Wm. Blacks, 934.

<sup>5</sup> *Neel Comul v. Bippro Dass*, 28 Cal. 597.

<sup>6</sup> *Pease v. Hirst*, 10 B. & C. 122; *Metcalf v. Bruin*, 12 East 400; see *Lindley*, p. 170.

<sup>7</sup> *Backhouse v. Hall*, 6 B. & S. 507.



**Dissolution of firm** :—The phrase 'dissolution of a firm', has been used in preference to 'dissolution of partnership' which has an element of ambiguity as it may refer to the severance of the connection of one partner with the firm, or to the complete breakdown of the relation of partnership between all the partners. Only the latter meaning is dealt with in this chapter. The severance of the connection of one partner only is dealt with in the previous Chapter.<sup>8</sup>

**40.** A firm may be dissolved with the consent of all the partners or in accordance with a contract between the partners.

Dissolution by agreement.

**Previous or subsequent agreement** :—This section covers the case where all the partners agree that the firm should then be dissolved; and also the case where the dissolution occurs in pursuance of a contract previously made, for example, in the articles of partnership.<sup>9</sup>

**41.** A firm is dissolved—

Compulsory dissolution.

- (a) by the adjudication of all the partners or of all the partners but one as insolvent, or
- (b) by the happening of any event which makes it unlawful for the business of the firm to be carried on or for the partners to carry it on in partnership :

Provided that, where more than one separate adventure or undertaking is carried on by the firm, the illegality of one or more shall not of itself cause the dissolution of the firm in respect of its lawful adventures and undertakings.

**Old law** :—Clause (b) corresponds to sec. 255 of the Indian Contract Act.

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<sup>8</sup> Notes on clauses.

<sup>9</sup> Notes on clauses.

**(a) Dissolution by bankruptcy :—**Dissolution of the firm is the inevitable result when all the partners or all but one are adjudged insolvent ; in the latter case only one remains and hence there is none to form a partnership with him. This is obviously not subject to contract between the partners as in the case of sec. 42 (d).

**(b) Dissolution by subsequent illegality :—**If the object of the partnership is illegal, it is void according to sec. 23 of the Indian Contract Act. This section contemplates dissolution in a case where a partnership was not originally unlawful but some event happens which makes it unlawful for the business of the firm to be carried on, *e.g.*, where the partnership involves trading at a place which becomes an alien country owing to an outbreak of war,<sup>9a</sup> or for the partners to carry it on in partnership, *e.g.*, where a partnership is formed with a person who becomes an alien enemy as a domiciled foreigner owing to the same cause.<sup>10</sup>

**Proviso : Where part becomes illegal :—**The proviso incorporates a suggestion made by Lindley. But when all the businesses are so connected that the cessation of one of them involves the cessation of all, the provision will not apply.<sup>11</sup>

## 42. Subject to contract between the partners a

Dissolution on the happening of certain contingencies.

firm is dissolved—

- (a) if constituted for a fixed term, by the expiry of that term ;
- (b) if constituted to carry out one or more adventures or undertakings, by the completion thereof ;
- (c) by the death of a partner ; and
- (d) by the adjudication of a partner as an insolvent.

<sup>9a</sup> See *Esposito v. Bowden*, (1857) 7 E. & B. 763.

<sup>10</sup> *Griswold v. Waddington*, (1818) 15 Johns. 57.

<sup>11</sup> See Lindley, p. 682. #

**Old law :—**Clause (c) corresponds to sec. 253 (10) of the Indian Contract Act and the case mentioned in clause (d) was a ground for a suit for dissolution under sec. 254 (2). Whereas under the old law insolvency of a partner did not *ipso facto* cause dissolution of the partnership, under the present enactment a firm is dissolved by the adjudication of a partner as an insolvent unless there is an agreement to the contrary (see notes under sec. 34).

**(a) Business continued after expiry of fixed term :—**

A contract of partnership comes to an end when the period under the written agreement expires.<sup>12</sup> If the partnership is continued after the expiry of the fixed term the rights and obligations of the partners will, in the absence of any agreement to the contrary,<sup>13</sup> remain the same as they were at the expiration of the term so far as such rights and obligations can be applied to a partnership dissoluble at the will of any partner.<sup>14</sup> And in this connection the provisions of sec. 109 of the Evidence Act should be noted. That section lays down that when the question is whether the persons are partners, and it has been shown that they have been acting as such, the burden of proving that they do not stand, or have ceased to stand, to each other in that relationship is on the person who affirms it. So where the firm continued its business after the expiry of the term, it existed on the original terms and it could be dissolved only by a special notice.<sup>15</sup> But provisions suitable to an agreement for a term of years are not so applicable, such as clauses for expulsion,<sup>16</sup> clauses in the nature of

<sup>12</sup> *Commissioner of Income Tax Madras v. Krishna Aiyar*, 52 Mad. 367 : 1929 Mad. 67 : 56 M.L.J. 151 : 29 L.W. 103 : 115 I.C. 254.

<sup>13</sup> *Nelson v. Mossen Iron Co.*, (1886), 11 App. Cas. 298; *Steuart v. Gladstone*, (1879) 10 Ch. D. 626, C.A.; *Essex v. Essex*, (1855) 20 Beav. 442.

<sup>14</sup> Sec. 17 (b); *Campbell v. Campbell*, (1893), 6 R. 137, H.L.; *Cox v. Willoughby*, (1880), 13 Ch. D. 863; *Daw v. Herring*, (1892), 1 Ch. 284; *Essex v. Essex*, (1855) 20 Beav. 442; *King v. Chuck*, (1853) 17 Beav. 425. See Halsbury, Vol. 22, p. 23, para. 36.

<sup>15</sup> *Parsons v. Hayward*, 31 L.J. Ch. 670.

<sup>16</sup> *Clark v. Leach*, (1862) 32 Beav. 14.

penalties,<sup>17</sup> and rights of pre-emption.<sup>18</sup> If a partnership originally entered into for a fixed term, is continued after its expiration and there is no evidence as to the additional time for which the partnership is to last, it is treated as having become a partnership at will, and not having been renewed for another definite period.<sup>19</sup>

It may be noted that 'where there is no express agreement to continue a partnership for a definite period, there may be an implied agreement to do so'.<sup>20</sup>

**(b) Where other works contemplated :—**Where, however, the partnership is entered into for a specific adventure or undertaking and also for doing such other work as the parties may undertake to do, there is no presumption that the partnership is dissolved by the completion of that adventure, and the burden of proving a dissolution in such a case lies on the party asserting it.<sup>21</sup>

**(c) Dissolution by death : principle involved :—**The principle of law embodied in this sub-section is based on the ground that the partners cannot be expected to acquiesce in new partners being forced on them.<sup>22</sup>

The representatives of a deceased partner have no right to succeed him in the partnership unless there is a clear agreement to that effect.<sup>23</sup> Hence unless otherwise agreed, if a partner dies before the expiry of the term, the partnership is dissolved in spite of the surviving partners or the personal

<sup>17</sup> *Hogg v. Hogg*, (1876) 35 L.T. 792.

<sup>18</sup> *Yates v. Finn*, (1880) 13 Ch. D. 839; Halsbury, vol. 22, p. 23, para. 36.

<sup>19</sup> *Featherstonhaugh v. Fenwick*, 17 Ves. 307; *Both v. Parkes*, 1 Moll. 465.

<sup>20</sup> *Crawshay v. Maule*, (1818) 1 Swan. 395; Halsbury, Vol. 22, p. 23, para. 35.

<sup>21</sup> *Mani Singh v. Dial Singh*, 42 I.C. 459.

<sup>22</sup> *Maharaj Kishen v. Har Gobind*, 101 P.R. 1914.

<sup>23</sup> *Pearce v. Chamberlain*, 2 Ves. Sen. 33; *Cromford v. Hamilton*, 3 Madd. 251; *Crawshay v. Maule*, 1 Swanst. 509; *Vulliamy v. Noble*, 3 Mer. 614; *Gillespie v. Hamilton*, 3 Madd. 251; *Crosbie v. Guin*, 23 Beav. 518. See Lindley, p. 448.

representatives of the deceased partner.<sup>24</sup> Where a sole proprietor dies and several heirs succeed they do not *ipso facto* become partners of the firm.<sup>25</sup> So unless a new partnership is formed the representatives of the deceased partner cannot be made jointly liable with the surviving partners.<sup>26</sup>

Where a partnership was restricted to a single adventure and a period of five years was fixed, the death of one partner dissolved the partnership.<sup>27</sup> If a partner dies after giving a notice of dissolution but before the expiration of the notice the partnership is dissolved by death and not by the notice.<sup>28</sup>

If after the dissolution of a partnership owing to the death of the partners, the business is carried on by somebody, it is a business of a new firm though it may have been carried on under the old name.<sup>29</sup>

**Implied agreement to the contrary:**—An implied agreement to continue a partnership even after the death of one of the partners operates to prevent the termination of the partnership on the death of a partner.<sup>30</sup> A partnership may come into existence by an express agreement to continue the firm or by an agreement implied from the fact of continuing the business after the death of the proprietor.<sup>31</sup> Partners may agree that on the death of any of them, his nominee or legal representative shall be entitled to take his place. Such agreement may be determined from the conduct of the parties.<sup>32</sup>

Where on the death of the partner, the business was carried on the assumption that the widow was a partner, it was held that the conduct of the parties shows that the original

<sup>24</sup> *Pearce v. Chamberlain*, (1750) 2 Ves. Sen. 33; *Gillespie v. Hamilton*, (1818) 3 Madd. 251.

<sup>25</sup> *Habib Bux v. Samuel Fitz & Co.*, 23 A.L.J. 691.

<sup>26</sup> *Nathu v. Narain*, 60 P.W.R. 1911.

<sup>27</sup> *Hemraj Kanji v. Topan Vishnaji*, 1925 Sind. 300.

<sup>28</sup> *Bell v. Nevlin*, (1866) 15 W.R. 85 (Eng.).

<sup>29</sup> *Gossain Gunga v. Dabee Das*, 25 W.R. 118.

<sup>30</sup> *Tannumal v. Gangaram*, 1925 Sind 103 : 94 I.C. 547.

<sup>31</sup> *Habib Bux v. Samuel Fitz & Co.*, 23 A.L.J. 961.

<sup>32</sup> *Haramohan v. Sudarson*, 25 C.W.N. 847 : 1921 Cal. 538 : 66 I.C.

agreement was that the partnership would not be dissolved on the death of a partner.<sup>33</sup> Where a partnership consisted of 30 partners and there was no evidence that the business was treated as dissolved on each of the occasions on which one of them dies, but on the contrary, if it had been so treated, a great deal of practical inconvenience would have been the result, there must be presumed to be an implied contract to the effect that death of one of the partners would not dissolve the partnership.<sup>34</sup> But the mere execution of a trust deed by a deceased partner for carrying on the business and its attestation by his partner<sup>35</sup> or the mere existence of an adventure<sup>36</sup> does not show a contract to the contrary. Though this subsection is subject to contract to the contrary, where the terms of the contract provides for admission of a nominee into the partnership in the event of a vacancy caused by a death, the mere fact that all the property was left to the executor of the deceased partner by his will will not make the executor a partner in the absence of nomination.<sup>37</sup>

A suit for accounts and dissolution would not be barred under Art. 106 Limitation Act even though brought more than 3 years after the death of the original partner.<sup>38</sup> Where a partnership is determined by death and the surviving partners carry on the business, the statute of limitation is no bar to taking the accounts of the new partnership by going into the accounts of the old partnership without interruption or settlement.<sup>39</sup>

**Onus to show contract to contrary :—**The operation of this clause is subject to contract and the remaining members of the firm being the persons having special means of know-

<sup>33</sup> *Gokul Krishna v. Shashimukhi*, 16 C.W.N. 299.

<sup>34</sup> *Mt. Basanti v. Babu Lal*, 124 I.C. 19.

<sup>35</sup> *Mahammed Kamel v. Hedayetullah*, 48 Cal. 906 : 1922 Cal. 122 : 64 I.C. 861 : 26 C.W.N. 463 : 33 C.L.J. 411.

<sup>36</sup> *Sayyad Abdul v. Valkuntam*, 100 I.C. 616 : 1927 Mad. 491 : 25 M.L.W. 388 : 38 M.L.T. 214 : 1927 M.W.N. 574 : 52 M.L.J. 318.

<sup>37</sup> See *Bachubai v. Shamji*, 9 Bom. 536.

<sup>38</sup> *Harjchand v. Jugal Kishore*, 1922 Lahore 349.

<sup>39</sup> *Maharaj Kishen v. Har Gobind*, 101 P.R. 1914.

ledge on the subject must show that there was no contract to the contrary.<sup>40</sup>

**Special rule in Hindu Law :—**The rights and liabilities of coparceners in a joint Hindu family must be considered with regard to the genreal rules of Hindu law according to which the death of one of the coparceners does not dissolve a family partnership.<sup>41</sup> The objection regarding forcing new partners on the old partners cannot arise where all that happens is that one of the existing partners becomes, by operation of law, entitled on the death of a coparcener to a larger share in the partnership property than he previously possessed in his individual capacity.<sup>42</sup> Where a joint family is a partner, the partnership is not dissolved on the death of the managing member of the family inasmuch as a joint family does not die on the death of the manager.<sup>43</sup> So where the manager of a joint Hindu family consisting of himself and his minor son was a partner in a partnership and died, *held* that the family which might be regarded as a *persona* continued to be a partner even after his death.<sup>44</sup> On the same principle, a power of attorney executed by two members of a Hindu joint family is not terminated by the death of one of them, as a stipulation to that effect is ordinarily to be inferred,<sup>45</sup> where the interest of the deceased member passes to the surviving member.<sup>46</sup> Where X and Y members of a joint family (of which Y was the *karta*) carrying on a joint family business entered into a contract of under-brokerage and X subsequently died, but Y and the other party to the contract went on dealing with each

<sup>40</sup> See *Secretary of State v. Jagat Mohini*, 28 Cal. 540.

<sup>41</sup> *Raghumull v. Luchmondas*, 20 C.W.N. 708; following *Samalbhat v. Someshwar*, 5 Bom. 38; *Lutchmanen v. Sita Prokasa*, 26 Cal. 349; 3 C.W.N. 190; *Vadi Lal v. Shah Khushal*, 27 Bom. 157, etc.

<sup>42</sup> *Maharaj Kishen v. Har Gobind*, 101 P.R. 1914.

<sup>43</sup> *Gauri Shankar v. Keshab Deo*, 1929 All. 148; 114 I.C. 881; 1929 A.L.J. 204; *Mewa Ram v. Ram Gopal*, 48 All. 395.

<sup>44</sup> *Narain Das v. Ralli Bros.*, 61 P.R. 1915.

<sup>45</sup> *Faqir Chand v. Hafi Naung Ram*, 1924 All. 277; 74 I.C. 721 (All.).

<sup>46</sup> *Ponnuswami v. Chidambaram*, 35 M.L.J. 294.

other as if the contract subsisted, *held* that X's death did not terminate the contract.<sup>47</sup>

**Where death dissolves partnership:**—But where subsequent to the partition of a Hindu joint-family, the family business is carried on by two of the members on the one side and another member on the other, the death of the latter dissolves the partnership.<sup>48</sup> Where the manager of a joint Hindu family is a member of a trading partnership, the family as a whole does not become a member of the partnership firm. Therefore the partnership terminates on his death, though the family continues to exist, and a suit for dissolution of the partnership brought more than 3 years after his death is barred by limitation.<sup>49</sup>

**Mahomedan family:**—Under the Mahomedan law there is no such thing as a family trading partnership as under Hindu law, and any partnership transaction between two Mahomedan brothers must be governed by the contract between the parties. Ordinarily the partnership terminates on the death of one of the partners unless there is evidence to the contrary.<sup>50</sup>

**Account suit after dissolution by death:**—Where a partnership is dissolved by the death of a partner, and a suit is filed for accounts, the business is to be regarded as a continuing business up to the date of the final decree.<sup>51</sup>

**(d) Bankruptcy of a partner:**—Under the Contract Act the adjudication of a partner as an insolvent did not by itself dissolve the partnership, but only provided a ground for the Court to decree dissolution<sup>52</sup> but under this section the adjudi-

<sup>47</sup> *Raghumull v. Luchmondas*, 20 C.W.N. 708.

<sup>48</sup> *Swarth Ram v. Ram Bullabh*, 47 All. 784 : 1925 All. 595 : 89 I.C. 27 : 23 A.L.J. 625 : 6 L.R.A. Civ. 465.

<sup>49</sup> *Ramanathan v. Yegappa*, 30 M.L.J. 241.

<sup>50</sup> *Solema Bibi v. Hafiz Mohamad*, 54 Cal. 687 : 1927 Cal. 836 : 104 I.C. 833.

<sup>51</sup> *Haji Hedayatulla v. Mahomed Kamil*, 1924 P.C. 93 : 29 C.W.N. 161 : 81 I.C. 525 : 22 A.L.J. 382 : 5 L.R. P.C. 109 : 19 M.L.W. 425 : 34 M.L.T. 69 : 1924 M.W.N. 660.

<sup>52</sup> *Nichal Singh v. Visherji*, 106 I.C. 54 : 1928 Sind 71.



cation dissolves the partnership but the matter is subject to contract between the parties. The bankruptcy of one partner dissolves the firm, not only as to him but as to all the co-partners *inter se*.<sup>53</sup> The same reasons which cause a dissolution of the partnership in the case of the death of a partner apply in this case because there is a transfer of the bankrupt's interest to the receiver and the other partners cannot be compelled to take him in as a co-partner. The fundamental principle is that a partnership cannot exist between any persons save by the mutual consent of all.

**43.** (1) Where the partnership is at will, the firm may be dissolved by any partner giving notice in writing to all the other partners of his intention to dissolve the firm.

Dissolution by notice  
of partnership at will.

(2) The firm is dissolved as from the date mentioned in the notice as the date of dissolution or, if no date is so mentioned, as from the date of the communication of the notice.

**Dissolution by notice:**—In a partnership at will a partner is entitled to dissolution,<sup>54</sup> and any partner may determine the partnership at any time on giving notice of his intention to do so to all the other partners,<sup>55</sup> unless, of course, there is an agreement to the contrary, but the mere fact that debts have been incurred or a lease for a term has been taken does not show that the partnership is to continue till that debt is paid or the lease expires. The will to dissolve may be intimated

<sup>53</sup> See *Hague v. Rolleston*, 4 Burr. 2174; *Fox v. Hanbury*, Cowp. 448; *Crawsay v. Collins*, 15 Ves. 228.

<sup>54</sup> *Ram Singh v. Ram Chand*, 51 I.A. 154 : 5 Lah. 23 : 1924 P.C. 2 : 79 I.C. 944 : 22 A.L.J. 14 : 33 M.L.T. 465 : 26 Bom. L.R. 196 : 28 C.W.N. 566.

<sup>55</sup> *Pullu v. Mahendra*, 1921 Cal. 722 : 34 C.L.J. 405 : 67 I.C. 10 : *Bhagwati v. Babu Lal*, 1921 All. 411 : 63 I.C. 548 : 19 A.L.J. 525.

by the filing of a plaint claiming dissolution by one partner which of itself is enough to put an end to a partnership at will.<sup>56</sup>

Lunacy of one of the partners to whom notice is given would be no bar to dissolution.<sup>57</sup> After notice the partnership would be deemed to continue only for the purpose of winding up.<sup>58</sup>

A notice may be prospective,<sup>59</sup> but cannot be withdrawn without consent.<sup>60</sup>

**44.** At the suit of a partner, the Court may dissolve a firm on any of the following grounds, namely :—

Dissolution by the Court.

- (a) that a partner has become of unsound mind, in which case the suit may be brought as well by the next friend of the partner who has become of unsound mind as by any other partner ;
- (b) that a partner, other than the partner suing, has become in any way permanently incapable of performing his duties as partner ;
- (c) that a partner, other than the partner suing, is guilty of conduct which is likely to affect prejudicially the carrying on of the business, regard being had to the nature of the business ;
- (d) that a partner, other than the partner suing, wilfully or persistently commits breach of agreements relating to the

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<sup>56</sup> *Sathappa v. Subrahmanyam*, 1927 P.C. 70 : 31 C.W.N. 857 : 101 I.C. 17 : 25 A.L.J. 687 : 1927 M.W.N. 500 : 53 M.L.J. 245 : 39 M.L.T. 232 : 26 M.L.W. 265 : 40 W.N. 491.

<sup>57</sup> *Mellersh v. Keen*, 27 Beav. 236.

<sup>58</sup> *Peacock v. Peacock*, 16 Ves. 16.

<sup>59</sup> *Mellersh v. Keen*, 27 Beav. 236.

<sup>60</sup> *Jones v. Llyod*, 18 Eq. 265.

management of the affairs of the firm or the conduct of its business, or otherwise so conducts himself in matters relating to the business that it is not reasonably practicable for the other partners to carry on the business in partnership with him;

- (e) that a partner, other than the partner suing, has in any way transferred the whole of his interest in the firm to a third party, or has allowed his share to be charged under the provisions of rule 49 of Order XXI of the First Schedule to the Code of Civil Procedure, 1908, or has allowed it to be sold in the recovery of arrears of land-revenue or of any dues recoverable as arrears of land-revenue due by the partner;
- (f) that the business of the firm cannot be carried on save at a loss; or
- (g) on any other ground which renders it just and equitable that the firm should be dissolved.

**Old law :—**Clauses (a), (b), (c), (e) and (f) correspond respectively to sub-secs. (1), (4), (5), (3) and (6) of sec. 254.

**Power of Court to grant dissolution and contract of parties :—**This section is not subject to contract between the parties and so the Court's power to decree dissolution in appropriate cases is unfettered by any agreement between the partners. A partner's claim to a decree for dissolution rests, in its origin, not on a contract, but on his inherent right to invoke the Court's protection on equitable grounds, in spite

of the terms in which the rights and obligations may have been regulated and defined by the partnership contract.<sup>61</sup>

**Arbitration clause** :—But “the right of a partner to claim a dissolution by the court may be controlled by an arbitration clause contained in the partnership articles. If such clause applies to all matters in dispute between the parties, the arbitrators have power to award a dissolution,<sup>62</sup> and, upon the application of the defendant, the court may order a stay of the action and refer the matter to arbitration. But the court has complete discretion in the matter.”<sup>63</sup>

**(a) Unsoundness of mind of a partner** :—Unsoundness of a partner by itself does not dissolve a partnership.<sup>64</sup> An order of Court is necessary to dissolve a partnership on the ground of unsoundness of mind of one of the partners.<sup>65</sup> The dissolution is granted not only for the purpose of protecting the lunatic,<sup>66</sup> but also for the purpose of relieving the co-partners from the difficult position in which the lunacy places them.<sup>66a</sup> Hence provision has been made for the suit being brought by the next friend of the partner of unsound mind as well as by any other partner. In order to constitute a ground for dissolution, the disorder must be permanent.<sup>67</sup>

**(c) Conduct affecting business** :—The conduct of the partner which is a ground for dissolution must be such as is likely to affect prejudicially the carrying on of business. In such cases the conduct destroys the mutual confidence among the partners which is essential to continue to carry on the

<sup>61</sup> *Rehmatunnissa v. Price*, 42 Bom. 380 : 22 C.W.N. 601, 607, P.C.

<sup>62</sup> *Russel v. Russel*, (1880) 14 Ch. App. 471.

<sup>63</sup> Halsbury, Vol. 22, p. 90, para. 176.

<sup>64</sup> *Wrexham v. Hudleston*, (1734) 1 Swan. 514n; *Waters v. Taylor*, (1813) 2 Ves. & B. 299, 303; Anon. (1855) 2 K. & J. 441, 447.

<sup>65</sup> *Jagat v. Gunny Hajee*, 53 Cal. 214 : 30 C.W.N. 11 : 91 I.C. 824 : 1926 Cal. 271.

<sup>66</sup> *Jones v. Lloyd*, 18 Eq. 265.

<sup>66a</sup> See *Sayer v. Bennet*, 1 Cox. 107 and other cases cited in Lindley, p. 684.

<sup>67</sup> *Jones v. Noy*, (1833) 2 My. & K. 125, 129; *Pearce v. Chamberlain*, (1750) 2 Ves. Sen. 33.

business,<sup>68</sup> *e.g.*, embezzlement by a solicitor,<sup>69</sup> or immoral conduct of one of two medical partners who also act as accoucheurs.<sup>70</sup> Similarly "keeping erroneous accounts and not entering receipts,<sup>71</sup> refusal to meet on matters of business,<sup>72</sup> continued quarrelling, and such a state of animosity as precludes all reasonable hope of reconciliation and friendly co-operation<sup>73</sup> have been held sufficient to justify a dissolution."<sup>74</sup> Application of sums received to the payment of private debts,<sup>75</sup> or refusal to account and the taking away the partnership books,<sup>76</sup> affords good grounds for relief.

But if the misconduct does not prejudicially affect the business it is not enough, *e.g.*, adultery of a partner in a mercantile firm.<sup>77</sup> Merely a trivial or occasional but not serious violations are not sufficient,<sup>78</sup> So mere partnership squabbles are not sufficient for dissolution.<sup>79</sup> Further, the misconduct must be on the part of a person other than the partner suing. If a partner renders it impossible for his partners to work in harmony with him owing to his own misconduct, he cannot sue for dissolution.<sup>80</sup> Thus where the plaintiff was himself guilty of gross misconduct, *e.g.*, when he had destroyed the old account books, had falsely prepared a balance sheet, had made false entries in the books and had tried to deprive the firm of a valuable document, he is not entitled to sue for dissolution of the partnership on the ground of disputes between

<sup>68</sup> See *Harrison v. Tennant*, 21 Beav. 482.

<sup>69</sup> *Essell v. Hayward*, (1860) 30 Beav. 158.

<sup>70</sup> See *Snow v. Milford*, (1868) 18 L.T. 142.

<sup>71</sup> *Cheeseman v. Price*, 35 Beav. 142.

<sup>72</sup> *De Berenger v. Hamel*, 7 Jar. Byth. 25 ed. 2.

<sup>73</sup> *Baxter v. West*, 1 Dr. & Sm. 173; *Watney v. Wells*, 30 Beav. 56; *Pease v. Hewitt*, Beav. 22; *Leary v. Shout*, 33 Beav. 582.

<sup>74</sup> *Lindley*, p. 691.

<sup>75</sup> *Smith v. Jeyes*, (1841) 4 Beav 503.

<sup>76</sup> *Charlton v. Poulter*, (1753) 19 Ves. 148n.

<sup>77</sup> *Snow v. Milford*, (1868) 18 L.T. 142.

<sup>78</sup> *Goodman v. Whitcomb*, (1820) 1 Jac. & W. 589, 592; *Loscombe v. Russel*, (1830) 4 Sim. 8, 11; *Anderson v. Andreson*, (1857) 25 Beav. 190.

<sup>79</sup> *Wary v. Hutchinson*, (1834) 2 My. & K. 235.

<sup>80</sup> See *Harrison v. Tennant*, 21 Beav. 493; *Fairthorne v. Weston*, 3 Ha. 387.

the partners and also misconduct and dishonesty on the part of the defendant.<sup>81</sup>

**(d) Breach of agreement :—**Refusal and neglect on the part of any one partner to perform the duties undertaken by him gives to any other partner the right to apply for dissolution or without legal proceedings the partnership could by agreement between all the partners be dissolved.<sup>82</sup> 'It must be a studied, prolonged and continued inattention to the application of one party calling upon the other to observe that contract'.<sup>83</sup>

But there is no provision in law for a dissolution of a partnership being brought about merely by one partner neglecting to do anything further towards the carrying on of the objects of the partnership.<sup>84</sup> Leaving the management to a co-partner does not amount to a dissolution of the partnership.<sup>85</sup> The stoppage of business or refusal of a partner to supply capital whenever the demand is made cannot be treated as dissolution of the firm.<sup>86</sup> But the cessation of the business coupled with other circumstances may legitimately lead to the inference that the partnership had been dissolved.<sup>87</sup>

**Destruction of mutual confidence :—**Where there has been a complete destruction of mutual confidence, and it is impracticable to continue the partnership business with advantage to the partners, or they can no longer perform their duties properly, the partnership should be dissolved.<sup>88</sup>

**(e) Assignment of a share :—**The English law on the effect of assignment by a partner of his share is not clear. But

<sup>81</sup> *Ram Singh v. Ram Chand*, 1 Lah. 6.

<sup>82</sup> *Krishnamachariar v. Sankara Sah*, 25 C.W.N. 314 P.C.

<sup>83</sup> *Marshall v. Colman*, (1820) 2 Jac. & W. 226, 268.

<sup>84</sup> *Chunni Lal v. Sheo Charan*, 47 All. 756 : 89 I.C. 122 : 1925 All. 787 : 23 A.L.J. 725 : 6 L.R.A. Civ. 362.

<sup>85</sup> *Maung Tha v. Mah Thin*, 28 Cal. 53 P.C.

<sup>86</sup> *Haramohan v. Sudarsan*, 25 C.W.N. 847 : 1921 Cal. 538 : 66 I.C. 811 ; *Maung Tha v. Mah Thin*, 28 Cal. 53 P.C. see also *Saudarsanam v. Narasimhulu*, 25 Mad. 149.

<sup>87</sup> *Baij Nath v. Chhote Lal*, 1928 All. 58 : 107 I.C. 673 : 26 A.L.J. 243.

<sup>88</sup> *G. A. Mackenzie v. Himalaya Assurance Co.*, 1926 Cal. 745 : 94 I.C. 381 : 30 C.W.N. 440 ; *Tulsi Ram v. Dina Nath*, 89 I.C. 333 : 1926 Lah. 145.

this section adheres to the old Indian law on the point. The assignment does not of itself create a partnership between the assignee and the assignor's co-partners who have a right to protest against the introduction of a partner against their consent. Therefore the right to sue for dissolution is given to them in cases of assignment and not to the assignor partner, and it seems that the assignee is in no better position in this respect. Where, therefore, some of the partners of a firm sell the business of the firm without the knowledge or consent of the other partners, the partnership is thereby dissolved.<sup>89</sup> The same would be the case in involuntary sales in execution of decrees because the interest of a partner in a partnership business is liable to be seized in execution of a personal decree against the partner and is a saleable property within the meaning of sec. 60 C. P. Code.<sup>90</sup>

**(f) Where business causes loss :—**The purpose of partnership is to share profits and dissolution may therefore be ordered even before the expiry of the original term, if the business can only be carried on at a loss.<sup>91</sup>

Generally speaking, it is the duty of the Courts to bring about the fulfilment of the expectations of the parties, and where a partnership has been entered into for a fixed term, the Courts should not permit a partner to drive the others to a dissolution.<sup>92</sup> When, however, it is established that the partnership business cannot be continued without a loss, the Court has jurisdiction, in the exercise of its sound discretion, to order its dissolution though the partnership is not terminable at will,<sup>93</sup> or though it was agreed that the partnership was to continue for some definite time and that time has not yet expired.<sup>94</sup> But

<sup>89</sup> *Gulrajamal v. Pamanmal*, 27 I.C. 344 (S).

<sup>90</sup> *Jagat v. Iswar*, 20 Cal. 693; *Parvatheesam v. Bapanna*, 13 Mad. 447; *Dwarika Mohan v. Luckmoni*, 14 Cal. 384 not foll.

<sup>91</sup> *Jennings v. Baddeley*, (1856) 3 K. & J. 78; *Balley v. Ford*, (1843) 13 Sim. 495.

<sup>92</sup> *Firm of Hari Mal v. Firm of Kirparam*, 2 Lah. 351 : 1922 Lah. 195 : 66 I.C. 473.

<sup>93</sup> *Rehmatunnissa v. Price*, 42 Bom. 380 : 22 C.W.N. 601, P.C.

<sup>94</sup> *Cowasee Nanabhoy v. Lalbhoy Vullubhoy*, 1 Bom. 468, 474, P.C.; *Hashan Ismayal v. Narhman*, 1924 Bom. 57 : 81 I.C. 463.

the inherent right of winding it up, or applying to have it wound up, in the event of its not being able to be carried on with success may be shown to have been relinquished by any provision in the agreement from which it can fairly be inferred,<sup>96</sup> and the mere failure of a company does not dissolve a partnership.<sup>96</sup>

**(g) Where dissolution is just and equitable :—**This subsection gives\* the Court ample jurisdiction to dissolve a firm on any ground which renders it just and equitable that the firm should be dissolved, and the Court is not confined to cases *ejusdem generis* as those mentioned in the previous sub-sections.

**Partner not fairly treated :—**The remedy of a partner who thinks that he is not being properly treated by his co-partners is to apply for dissolution of the partnership and to have its accounts taken.<sup>97</sup> He cannot leave the partnership if its term has been fixed by agreement.<sup>98</sup>

**Place of suing :—**The place of suing is the place where the cause of action, *e.g.*, the fact that the business could only be carried on at a loss, arises notwithstanding that part of the capital to start the partnership was subscribed elsewhere.<sup>99</sup>

**Limitation :—**A suit for dissolution of a continuing partnership is governed by Art. 120, Limitation Act, and the limitation is 6 years from the time when the right to sue accrues.<sup>1</sup>

**45. (1)** Notwithstanding the dissolution of a firm, the partners continue to be liable as such to third parties for any act done by any of them which would have been an act of the firm if done

Liability for acts of partners done after dissolution.

<sup>96</sup> *Cowasjee Nanabhoy v. Lalbhoy Vullubhoy*, 1 Bom. 468, 474, P.C.

<sup>96</sup> *Gur Diyal v. Sukhnandan*, 1929 All. 236 : 117 I.C. 824.

<sup>97</sup> *Bhut Nath v. Girish Chandra*, 11 C.W.N. 311.

<sup>98</sup> *Abdullah v. Safiulla*, 64 I.C. 204 (Cal.).

<sup>99</sup> *Allah Ditta v. Shankar*, 42 P.R. 1916.

<sup>1</sup> See *Haramohan v. Sudarson*, 25 C.W.N. 847 : 66 I.C. 811 : 1921 Cal. 538; *Narayanaswami v. Gangadhar*, 37 M.L.J. 353.



before the dissolution, until public notice is given of the dissolution :

Provided that the estate of a partner who dies, or who is adjudicated an insolvent, or of a partner who, not having been known to the person dealing with the firm to be a partner, retires from the firm, is not liable under this section for acts done after the date on which he ceases to be a partner.

(2) Notices under sub-section (1) may be given by any partner.

**Old law :—**Continuance of liability after dissolution until public notice is given was provided for in sec. 264 of the Indian Contract Act. The words “unless they themselves had notice of such dissolution” have been omitted in the present section with the result that in order to terminate the liability public notice of the dissolution is now essential, and cases under the old section which held that actual or constructive notice of the dissolution was fatal to fix the liability<sup>2</sup> or that the rule enacted a form of estoppel by conduct and cannot be taken advantage of by a person unless the facts raise presumption that the absence of notice excited in him a belief which caused him to do something that he would not otherwise have done<sup>3</sup> do not seem to be in accordance with the rule of law as at present enacted.

**Liability for acts after dissolution :—**This section should be read with sections 32, 33, and 34 and the principles stated under sec. 32 (3) apply in this case. The law which regulates the liability of partners for the acts of their co-partners is a branch of the law of agency. Each partner is the agent of his co-partners for the purpose of conducting debts and obligations in the usual course of partnership, and when this agency has once been established, it does not cease as regards third persons until its termination has been known to them. In the case,

<sup>2</sup> *Mahadeva v. Ram Krishna*, 1926 Mad. 114 : 92 I.C. 653 : 1925 M.W.N. 707 : 50 M.L.J. 67 : 23 L.W. 199.

<sup>3</sup> *Bichhla Lal v. Munshi Ram*, 68 I.C. 932 : 1922 Lah. 466.

therefore, of a dissolution of the partnership or of the retirement of one of its members, the agency as between the partners themselves would cease from the time of such dissolution or retirement; but as regards third persons the agency would continue until it had been duly notified.<sup>4</sup> Hence, provided a person had knowledge of a partnership, he will not be affected by the dissolution of that partnership in his dealing with the firm unless public notice of the same is given even if he is a new customer.<sup>5</sup>

**Acknowledgment by a partner after dissolution :—**

Acknowledgment made in the usual course of and essential to the business made by one of several partners in the absence of public notice of dissolution is binding on the resigning partner.<sup>6</sup> There is no material difference between an ordinary partnership firm and a Hindu joint family consisting of adult coparceners who actively conduct the business of the firm.

Where a partnership composed of the members of a joint Hindu family is dissolved but no public notice of the dissolution is given and the firm is continued by one of the partners, an acknowledgment of a debt due to a creditor signed by a partner who serves in the firm on salary, in the name of the original firm, is binding on all the members of the firm as the original firm must be deemed to have continued and the member signing to have authority as partner to bind his late partners along with himself by the acknowledgment.<sup>7</sup>

**No notice necessary in case of death, bankruptcy or where defendant not known as partner :—**But to this rule three exceptions are made by the proviso, though the case of a partner not known as such to the creditor is an apparent but

<sup>4</sup> *Chundee Churn v. Eduljee Cowasjee*, 8 Cal. 678; foll. in *Jagat Chandra v. Gunny Haje*, 53 Cal. 214 : 30 C.W.N. 11 : 91 I.C. 824 : 1926 Cal. 271.

<sup>5</sup> See *Chenchu Venkata v. Padmanabhan*, 1928 Mad. 125 : 106 I.C. 904 : 1927 M.W.N. 770.

<sup>6</sup> See *Bengal National Bank v. Jatindra Nath*, 56 Cal. 556 : 33 C.W.N. 412 : 1929 Cal. 714.

<sup>7</sup> *Krishnabai v. Varjivandas Jagjivandas*, 1930 Bom. 236 : 32 Bom. L.R. 201.

not real exception to the rule. No notice is necessary in the case of dissolution by the death of a partner or his bankruptcy, and in such cases his estate would not be liable for acts done after the death or bankruptcy. It may be noted that this proviso follows the English law on the point which is again based upon the principle that, by the law of England, the authority of an agent is determined by the death of the principal, whether the fact of death is known or not.<sup>8</sup> Hence in the case of liabilities of the firm which have arisen after the death of the partner, it makes no difference that at the time when the partnership liability arose the third party believed the deceased partner to be still living and a member of the firm.<sup>9</sup> Under the proviso to section 45 no notice of death is necessary to terminate the liability of the deceased partner for partnership debts contracted after his death.<sup>10</sup> Hence a deceased partner's estate is not liable for goods ordered before but supplied after his death although the vendor had not notice of the death.<sup>11</sup> Where before paying the price of goods ordered for a partnership, one of the partners died and to pay for the goods the surviving partner borrowed money from the plaintiff who sued the surviving partner and the representatives of the deceased partner, *held* that the former was personally liable and the assets of the partnership in his hands were also liable for the debt, but the estate of the deceased partner was not liable for it.<sup>12</sup>

But the principle on which this is based seems to be different so far as the general contract law of India is concerned, for section 208 of the Indian Contract Act lays down that "the termination of the authority of an agent does not, so far as regards the agent, take effect before it becomes known

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<sup>8</sup> See *Blades v. Free*, 9 B. & C. 167; *Smout v. Ilbery*, 10 M. & W. 1; *Campanari v. Woodburn*, 15 C.B. 400.

<sup>9</sup> *Devaynes v. Noble*, 1 Mer. 529; *Houlton's case*, 1 Mer. 616.

<sup>10</sup> *Vullamy v. Noble*, (1817) 3 Mer. 593; *Crawshay v. Maule*, (1818) 1 Swan. 495; *Devaynes v. Noble*, *Houlton's Case*, (1816) 1 Mer. 528, 616.

<sup>11</sup> *Friend v. Young*, (1897) 2 Ch. 421; *Bagel v. Miller*, (1903) 2 K.B. 212.

<sup>12</sup> *Seshi Ammal v. Vairavan*, 42 Mad. 15.

to him, or so far as regards third persons, before it becomes known to them". This is an instance where the general contract law is inconsistent with the express provisions of the Indian Partnership Act in which cases the former will not apply (sec. 3).

It may be noted that "the death of one partner does not, however, determine an authority given by the firm through him before his death; and consequently, if after his death such an authority is acted on, the surviving partners would be liable for it."<sup>13</sup> "Moreover, it does not follow that because a creditor has no remedy against the estate of a deceased partner in respect of debts contracted by his co-partners since his death, his estate is not liable to contribute to such debts at the suit of the surviving partners. That is a different matter altogether, and depends on the agreement into which he entered with his co-partners."<sup>14</sup>

**Liability of dormant partners :—**With regard to a dormant partner the rule is that 'he may retire from a firm without giving notice to the world'.<sup>15</sup> The reason is that he was not known to the third party who dealt with the firm after his retirement and therefore no credit was given to him nor did the third person act on the faith that he was a partner. Hence a dormant partner cannot be sued for debt contracted by other partners who carry on the business under the old name after the dissolution of the partnership where the creditor had not dealt with the old partnership and had not received notice of its dissolution, nor had knowledge of the dormant partner's previous connection with the partnership.<sup>16</sup>

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<sup>13</sup> Lindley, p. 282; *Usher v. Dauncey*, 4 Camp. 97.

<sup>14</sup> Lindley, p. 282.

<sup>15</sup> *Heath v. Sansom*, 4 B. & Ad. 172.

<sup>16</sup> *Ramasami v. Kadar*, 9 Mad. 492; *Greaves Cotton & Co. v. Purshottam*, 5 Bom. L.R. 366; see also *Rustomji v. Seth Purshotamdas*, 25 Bom. 606, 614; *David Sasoon & Co.*, In the matter of, 1927 Sind 155; *Bhaishankar v. Lakshmi*, 1930 Bom. 447; *Jwaladutt v. Bansilal*, 1927 Bom. 560; 29 Bom. L.R. 1244; 104 I.C. 520. In *Gisvani v. Vallabhdas*, 17 Bom. L.R. 762; 30 I.C. 864 and *Promotha v. Bhagwandas*, 35 C.W.N. 705; 54 C.L.J. 516; 1932 Cal. 236, old section 264 of the Indian Contract Act was held to apply to a dormant partner, or to a partner who was

“Retires from the firm” :—Sub-section (1) of section 36 of the English Act on which the general rule in section 45 of the Indian Act is based seems to confine the application of the principle contained in it to dealings with a firm after a *change in its constitution*, and so in sub-section (3) of the English section the words “retires from the firm” are used. But an improvement has been made in section 45 of the Indian Act on the ground that ‘there is no reason to differentiate, in the matter of the presumed continuance of mutual agency, between the case where a partner leaves the firm and the case where a firm is dissolved.’ Section 45 deals with the liability of a partner for acts of other partners done after *dissolution*, and the liability of a partner for acts of his co-partners done after *retirement* has been provided for in sub-section (3) of section 32. According to section 32 a partner may retire without dissolving the partnership, and section 45 has reference to dissolution which might or might not have been the result of retirement of a partner. But the proviso reproduces sub-section (3) of section 36 of the English Act. The inclusion of the words “retires from the firm” in the proviso to section 45 appears to have the effect of restricting the operation of the proviso which does not seem, in terms, to cover the case of a dormant partner, not known to the creditor as a partner, in all cases of dissolution, *e.g.*, where it results from the death of another partner. Take a case. S and E, partners in a business, dissolved the partnership by mutual agreement. E was not known to be a partner but the dissolution was not notified. After the dissolution S gave the plaintiff a pro. note on which he sued S and E. *Held* that E ceased to be a partner and was not liable unless he authorised the subsequent acts of his co-partner or held himself out as still connected with him.<sup>15a</sup> Would the decision have been otherwise if in the above case there had been three partners, S, E and X, and the dissolution was the result of X’s death? E was not known to be a partner and no credit was given to

not known to be such, withdrawing from a firm. But these cases are no authority in view of the express enactment in this section and in section 32 (3).

<sup>15a</sup> *Heath v. Sansom*, 4 B. & Ad. 172.

him. The reason for the general rule is therefore absent in his case. But such cases could not possibly be brought under the terms of this proviso, as, strictly speaking, the dormant partner did not *retire* from the firm but merely ceased to be a partner on dissolution, and would not come under sec. 47 either, as no authority was exercised to wind up the affairs of the firm or to complete transactions begun but unfinished at the time of the dissolution for which alone the authority exists.\*

**46.** On the dissolution of a firm every partner or his representative is entitled, as against all the other partners or their representatives, to have the property of the firm applied in payment of the debts and liabilities of the firm, and to have the surplus distributed among the partners or their representatives according to their rights.

**Share of a partner :—**"On the dissolution of the partnership all the property belonging to the partnership shall be sold, and the proceeds of the sale, after discharging all the partnership debts and liabilities, shall be divided among the partners according to their respective shares".<sup>17</sup> On dissolution all partners have equal rights and no partner has a right to insist that any particular item of the partnership property shall remain unsold and that it should be either divided *in specie* or allotted

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\* Such cases would not also come under sec. 36 (3) of the English Partnership Act, but that does not seem to affect the actual decision, because, by reason of sec. 46 of that Act, the rules of equity and of common law are still applicable in so far as they are not inconsistent with the express provisions of that Act. But the Indian Partnership Act together with the unrepealed provisions of the Indian Contract Act should be taken to be exhaustive of the law of partnership so far as those Acts go. Hence it is submitted that the intention of the legislature would have been more fully expressed if the following italicised words in the proviso were omitted and the words in brackets inserted :

Provided that the estate of a partner who dies, or who is adjudicated an insolvent, or of a partner who, *not having been* [was not] known to the person dealing with the firm to be a partner, *retires from the firm*, is not liable under this section for acts done after the date on which he ceases to be a partner.

<sup>17</sup> *Darby v. Darby*, 3 Drew. 503.

to him at an arbitrary value.<sup>18</sup> But there may be a provision to obviate sale and for distribution of the assets among the partners *in specie*, and such provision is binding if it can be carried out.<sup>19</sup> Land forming part of partnership property will be sold though there are no debts.<sup>20</sup> Assets which are unsaleable must be charged in the accounts at a valuation.<sup>21</sup>

In the absence of evidence the shares of the partners are deemed to be equal.<sup>22</sup> The share of a partner is his proportion of the joint assets after their realisation and conversion into money and after payment and discharge of the joint debts and liabilities.<sup>23</sup> Such share includes sums advanced by either partner beyond his due proportion.<sup>24</sup> With regard to payment of the share due to a partner it is to be noted that all debts due from him to the firm must be satisfied out of his share before it is available for the payment of his other debts.<sup>25</sup>

**Partner's lien :—**“Each partner may be said to have an equitable lien on the partnership property for the purpose of having it applied in discharge of the debts of the firm; and to have a similar lien on the surplus assets for the purpose of having them applied in payment of what may be due to the partners respectively, after deducting what may be due from them, as partners, to the firm.”<sup>26</sup> This lien is available not only against other partners but also against all persons claiming through all or any of them, *e.g.*, the assignees (sec. 29),

<sup>18</sup> *Darby v. Darby*, (1856) 3 Drew. 495; *Amritlal v. Devsi Jamal*, 1926 Sind 49; 89 I.C. 577.

<sup>19</sup> See Halsbury, Vol. 22, p. 101, para. 201.

<sup>20</sup> *Wild v. Milne*, (1859) 26 Beav. 504.

<sup>21</sup> Halsbury, Vol. 22, p. 103, para. 205.

<sup>22</sup> *Robinson v. Anderson*, 20 Beav. 98; *Peacock v. Peacock*, 16 Ves. 49; *Webster v. Bray*, 7 Ha. 159; *Farrar v. Beswick*, 1 M. Rob. 527.

<sup>23</sup> *Garbett v. Veale*, (1843) 5 Q.B. 408.

<sup>24</sup> *West v. Skipp*, (1749) 1 Ves. Sen. 239; Halsbury, Vol. 22, p. 55, para. 104.

<sup>25</sup> *Croft v. Pike*, 3 P. Wms. 180.

<sup>26</sup> Lindley, p. 438; *West v. Skipp*, 1 Ves. S. 239; *Skipp v. Harwood*, 2 Swanst. 568 and other cases cited; *Babu v. Gokuldoss*, 1930 Mad. 393;

<sup>30</sup> M.L.W. 657; 57 M.L.J. 404.

mortgagees,<sup>27</sup> execution creditors,<sup>28</sup> executors,<sup>29</sup> or trustees in bankruptcy.<sup>30</sup>

But its application has limitations. It applies only to partnership property at the time of dissolution and not to property subsequently acquired by continuing to carry on the business.<sup>31</sup> The lien does not exist for any practical purpose until the affairs of the partnership have to be wound up, or the share of a partner has to be ascertained. Further a partner's lien on partnership property is lost by the conversion of such property into the separate property of another partner.<sup>32</sup> No lien can be claimed against a purchaser or pledgee of partnership property without notice of want of authority of a partner to sell or pledge, for he is not bound to see the application of the money.<sup>33</sup> "To hold, however, that this lien could be enforced against persons purchasing partnership property would be in effect to prevent any sale of that property without the consent of the whole firm, and would practically stop all partnership trade. Whilst, therefore, a person who purchases a share of a partner takes that subject to the liens of the other partners, a person who *bona fide* purchases from one partner specific property belonging to the firm acquires a good title to such property, whatever liens the other partners might have had on them prior to their sale".<sup>34</sup>

**Right of a partner to purchase:**—Partners who are not entrusted with the conduct of sale may be given permission to bid.<sup>35</sup>

<sup>27</sup> *Cavander v. Bulteel*, (1873) 9 Ch. App. 79.

<sup>28</sup> *West v. Skip*, 1 Ves. Sen. 239; *Skip v. Harwood*, (1747) 2 Swan. 586.

<sup>29</sup> *Stocken v. Dawson*, (1845) 9 Beav. 239.

<sup>30</sup> *Croft v. Pike*, 3 P. Wms. 180; *Re Butterworth*, Ex parte Plant, (1835) 4 Diac. & Ch. 160.

<sup>31</sup> *Payne v. Hornby*, 25 Beav. 280.

<sup>32</sup> *Lindley*, p. 442.

<sup>33</sup> *Re Langmead's Trusts*, 20 Beav. 20.

<sup>34</sup> *Lindley*, pp. 440, 441 quoted in *Babu v. Gokuldoss*, 1930 Mad. 393 :

<sup>30</sup> M.L.W. 657 : 57 M.L.J. 404.

<sup>35</sup> *Wild v. Milne*, (1859) 26 Beav. 504; *Dean v. Wilson*, (1878) 10 Ch. D. 136.



**No accounting without dissolution** :—In England it was formerly considered that no account between partners could be taken in equity, save with a view to dissolution.<sup>36</sup> This rule still applies though it has been considerably relaxed. Following this rule it has been held in India as a general rule that one partner cannot sue another except for a dissolution and taking of general accounts of the partnership,<sup>37</sup> and it has been observed that actions between partners which involve the taking of partnership accounts prior to dissolution are almost unheard of.<sup>38</sup> And in some cases there are ample reasons for not entertaining such suits. Thus a dispute between partners whose business has come to an end regarding the division of assets can only be finally settled in a suit for dissolution and for adjustment of accounts, and it is not proper that each of the parties should proceed by separate suits in order to recover from the other any sum due to the partnership business which he alone may have realised.<sup>39</sup> Similarly, a partner is not entitled to sue for his share in one item alone of the partnership assets, without first having an account taken of the partnership liabilities and deducting the sum total of them from the aggregate assets of the firm.<sup>40</sup> Nor, for the same reason, can he sue for the recovery of money deposited by him as his share and for profits without ascertaining the ultimate liability of each of the partners by a general account.<sup>41</sup>

A partner cannot sue for money lent by him to the firm as the advance is but an item in the partnership account.<sup>42</sup> Nor can a surviving partner sue the legal representatives of a deceased partner for recovery of partnership money alleged to

<sup>36</sup> *Forman v. Homfray*, (1873) 2 Ves. & B. 329; *Knebell v. White*, 2 Y. & C. Ex. 15.

<sup>37</sup> *Damodara v. Subbaraya*, 6 L.W. 742.

<sup>38</sup> *Kassa Mal v. Gopi*, 9 All. 120; *Krishnaswamy v. Jayalakshmi*, 1931 Mad. 300.

<sup>39</sup> *Ram Chandra v. Krishna Lal*, 17 C.W.N. 351.

<sup>40</sup> *Annamalai v. Annamalai*, 52 I.C. 456 (Mad.).

<sup>41</sup> *Kalee Churn v. Ram Lal*, 21 W.R. 300.

<sup>42</sup> *Rustomji v. Seth Purshotamdas*, 25 Bom. 605; *Kashi Nath v. Ganesh*, 26 Bom. 739.

have been utilised by the deceased in paying his private debt and of alleged overdrawn without taking a final account.<sup>43</sup> Even if in an action by a partner against a customer to recover the price of goods sold he joins his co-partner as a defendant praying that if he has received the money a decree may be passed against him. the suit will not lie.<sup>44</sup>

On similar principles, no suit lies by one partner against another for damages for breach of certain covenants in the partnership deed. In such cases the proper course is to bring a suit for general accounts and debiting the defaulting partner with any loss that might have been incurred by his action in the general account.<sup>45</sup>

**Contribution among partners :—**The general rule of law is that one of the several partners in a trade, who pays money on account of his co-partners, cannot maintain an action against them for contribution on the ground that he made such payment not voluntarily but by compulsion of law, the reason of the rule being that justice cannot be done between the partners without balancing the partnership accounts and that the partner suing is bound jointly with the other partners to contribute to that and all other partnership debts.<sup>46</sup> Each partner is only the agent of the others and the rights of the partners are not with reference to single items of transactions but to the taking of entire accounts of the partnership.<sup>47</sup> Hence if the liability satisfied was a liability of the partnership, then the mere fact of the one partner having been compelled to pay the whole of the partnership debt would not entitle him to sue his co-partners for contribution in the absence of special circumstances, though, of course, he would be entitled to charge the sum paid

<sup>43</sup> *Ramaswami v. Muthukaruppan*, 1925 Mad. 737 : 88 I.C. 153 : 1925 M.W.N. 497 : 48 M.L.J. 444.

<sup>44</sup> *Bhut Nath v. Girish Chander*, 11 C.W.N. 311.

<sup>45</sup> *Santhanakrishna v. Chellappa*, 1927 Mad. 650 : 101 I.C. 390 : 25 M.L.W. 506 : 38 M.L.T. 345.

<sup>46</sup> *Shidlingappa v. Shankarappa*, 28 Bom. 176, 179; following *Sadler v. Nixon*, 5 B. & Ad. 936; *Goddard v. Hodges*, 1 C. & M. 33.

<sup>47</sup> *Aruna Chalam v. Rowther*, 1928 ad. 588 : 110 I.C. 484 : 27 M.L.W. 597 : 1928 M.W.N. 394.

in the partnership accounts.<sup>48</sup> This rule would apply even though the plaintiff is an assignee of a partner who had transferred his alleged right of contribution because the assignment had been made to get over the difficulty of the assignor himself obtaining a decree against his co-partner and also because nothing would probably be due to the plaintiff's assignor if accounts were taken between him and the defendant.<sup>49</sup>

But such a principle is inapplicable to the case of a debt which is not properly and legally a partnership debt. A partnership debt is a debt of the partnership and not merely a debt which is somehow merely connected with the partnership. A partnership debt has various legal incidents as such and it is only to such debts properly so called that the rule above enunciated can be applicable. If for the purpose of paying off a debt which is a partnership debt two partners especially after dissolution go and borrow on their own individual credit and raise money sufficient to pay off the partnership debt, it would be a travesty of justice to call the new debt a partnership debt.<sup>50</sup>

### **Suit for partial account : exception to the general rule :**

—As noted above the old rule that a decree for an account between partners will not be made save with a view to the final determination of all questions and cross claims between them, and to a dissolution of the partnership has been gradually relaxed in England, "for it has been felt that more injustice frequently arose from the refusal of the Court to do less than complete justice, than could have arisen from interfering to no greater extent than was desired by the suitor aggrieved . . . although it is still applicable where there is no sufficient reason for departing from it."<sup>51</sup> An account may be ordered without a claim for dissolution in a proper case, where a sufficient reason is shown for departing from the usual rule, for example, where

<sup>48</sup> *Guda Kulita v. Joyram*, 26 Cal. 262.

<sup>49</sup> *Damodara v. Subraya*, 33 M.L.J. 509.

<sup>50</sup> *Aruna Chalam v. Rowther*, 1928 Mad. 588 : 110 I.C. 484 : 27 M.L.W. 597 : 1928 M.W.N. 394.

<sup>51</sup> Lindley, pp. 601, 602.

a partner is trying to exclude his partner from some secret benefit or from the partnership, or to force him to a dissolution, or where there is a refusal to account, or where a limited account will meet the necessity or justice of the case.<sup>52</sup>

In regard to suits by one partner against another for a particular account, the general rule, as applied in India, is that if the account is sought in respect of a matter, which though arising out of partnership business or connected with it does not involve the taking of general accounts, the Court will as a rule give the relief prayed for. It will be for the Court to determine under what circumstances it will be equitable to order a partial account, having regard to the rights of the parties under the contract.\* There is no rule of law now in force that a partial account can only be ordered only under exceptional circumstances.<sup>53</sup> So where under the terms one partner is bound to hand over to another partner who had advanced all the capital all cheques received by him, a suit by the latter against the former to deliver a cheque or the money lies whether such payment be regarded as a claim for damages or for partial account.<sup>54</sup>

Apart from such a contract one partner may sue another for accounts during the subsistence of the partnership without asking for its dissolution if there exist certain circumstances which can excuse a departure from the general rule,<sup>55</sup> e.g., where a partner withholds the annual profits of a concern from a member of the firm.<sup>56</sup> But the grounds on which such a suit

<sup>52</sup> *Harrison v. Armitage*, (1819) 4 Madd. 143; *Richardson v. Hastings*, (1844) 7 Beav. 301; *Bentley v. Bates*, (1840) 4 Y. & C. (Ex.) 182; *Fairthorne v. Weston*, (1844) 3 Hare 387; *Chapple v. Cadell*, (1822) Jac. 536; *Wallworth v. Holt*, (1841) 4 My. & Cr. 619. Halsbury, Vol. 22, p. 71, para. 138.

\* Also *Harji Mal-Mela Ram v. Kirpa Ram-Brij Lal*, 2 Lah. 351.

<sup>53</sup> *Golla Nagabhushanam v. Kanakala*, 2 M.H.C.R. 28 not foll. See also *Kassa Mal v. Gopi*, 9 All. 120.

<sup>54</sup> *Karri Venkata v. Kollu Narasayya*, 32 Mad. 76.

<sup>55</sup> *Raghubar v. Sheoram*, 1 A.L.J. 94.

<sup>56</sup> *Firm of Hari Mal v. Firm of Kirparam*, 2 Lah. 351 : 1922 Lah. 195 : 66 I.C. 478.

is maintainable must be alleged by the plaintiff, while the defendant must have an opportunity of showing cause against.<sup>57</sup> The principle is that where justice requires that all the dealings of the partnership should be finally determined, the Courts will not allow a partial account to be taken but when the basis of the claim is unconnected with the partnership business, or is only very remotely connected therewith, an action is maintainable, when no injustice is caused by dealing with this one claim separately.<sup>58</sup>

A partner may have a right of action against another for a debt which is independent of the partnership accounts,<sup>59</sup> e.g., when a partner takes a pro. note from his co-partners in payment of an advance made by him to the partnership,<sup>60</sup> or when a pro. note is executed in favour of one partner by another in respect of a matter not involving the taking of general accounts though arising out of the partnership business or connected with it.<sup>61</sup> It is no answer to such suit that the general accounts of the partnership were not taken at the time when the pro. note was given, and that if such accounts were taken it would appear that nothing was due to the plaintiff. Such a defence amounts to a set off of an unliquidated amount which is not allowable.<sup>62</sup> On the same principle, an action for the balance of a settled account would not be restrained merely because there were other unsettled accounts between the parties, and when the defendant has not chosen to sue the plaintiff for adjustment of partnership accounts, he cannot invite the Court to assume that the balance of that account would be found in his favour.<sup>63</sup> A suit lies to compel the defendant to account for and

<sup>57</sup> *Krishnaswamy v. Jayalakshmi*, 1931 Mad. 300.

<sup>58</sup> *Ramaswami v. Muthukaruppan*, 1925 Mad. 737 : 88 I.C. 153 : 1925 M.W.N. 497 : 48 M.L.J. 444.

<sup>59</sup> *Simpson v. Rackham*, (1831) 5 Moo. & P. 612; *Worrall v. Grayson*, (1836) 1 M. & W. 166.

<sup>60</sup> *Vallamkondu v. Malupeddi*, 31 Mad. 343.

<sup>61</sup> *Sunkara Ratha Doss v. Epari Koppils*, 49 I.C. 191.

<sup>62</sup> *Vallamkondu v. Malupeddi*, 31 Mad. 343.

<sup>63</sup> *Ramanath v. Pitambar*, 43 Cal. 733 : 21 C.W.N. 632 : 22 C.L.J. 339 : 31 I.C. 430; *Rawson v. Samuel*, 34 R.R. 259 ref. to.

pay over a share of a sum realised on a joint speculation or to provide for the plaintiff's share out of another fund realised under the joint orders of the parties.<sup>64</sup>

**Contribution among partners :—**Similarly, where advances are made by one partner not to the partnership concern, but to the other partner in respect of what he is to contribute to the joint capital,<sup>64a</sup> or when two partners borrow from a bank on their joint pro. note and apply the money to a partnership concern and one of the partners is compelled to pay more than his share of debt, the transactions have been considered to be separate and altogether *dehors* the partnership, and as such capable of sustaining an action for contribution.<sup>65</sup> If moneys are borrowed on the individual credit of a partner and used in the business when the agreement gives every partner authority to borrow for the business and a decree is obtained for the same which the borrowing partner is obliged to satisfy, it would be no defence to a suit for contribution by him that there was no adjustment of accounts as the money borrowed did not become an item of the partnership account.<sup>66</sup> Similarly where the plaintiff and the defendant jointly borrowed money for carrying on a joint business which was applied for the partnership, and the creditor, after obtaining a decree against them, executed it against the plaintiff alone and realised the entire amount from him, in a suit for contribution against the defendant, *held* that though there was no adjustment of accounts the suit was maintainable.<sup>67</sup> Such also would be the case where the liability satisfied by the plaintiff is not a joint liability of the entire partnership; or where the said partners were some only of several persons comprising the partnership, and the bond was executed not in the usual course of business of partnership, or

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<sup>64</sup> *Pitchayya v. Narasayya*, 7 Mad. 246.

<sup>64a</sup> *French v. Styring*, 2 C.B.N.S. 365.

<sup>65</sup> *Subbarayudu v. Adinarayudu*, 18 Mad. 134, 135; *Dayal v. Katav*, 12 B.H.C. 97.

<sup>66</sup> *Durga Prosonno v. Raghu Nath*, 26 Cal. 254.

<sup>67</sup> *Laban Sardar v. Choyen Mallik*, 19 C.W.N. 768.

where co-partners expressly promised to contribute their share of debt after a decree has been passed upon the bond.<sup>68</sup>

A partner who, after dissolution of the partnership, has been compelled to pay a debt due by the partnership, can maintain a suit for contribution against his co-partners, even though a suit for general account is barred by limitation. This principle will apply equally whether the party suing is a partner or his representative.<sup>69</sup>

**Right to account is mutual :**—The right to call for an account upon the dissolution of a firm, is mutual, and each partner is entitled to an account from his co-partners of their partnership dealings and transactions, unless he has legally waived or parted with such right. The personal representatives of a deceased partner are entitled to an account from the surviving partners. The former are also bound to account when the deceased partner had the management or control of the assets of the firm.<sup>70</sup> So a suit for rendition of accounts of a partnership business is maintainable by the surviving partner against the minor son of a deceased partner who in his lifetime was the manager and had the account books in his keeping.<sup>71</sup>

**Account to begin from start :**—In a suit for partnership accounts unless it is shown that there has been an adjustment of accounts at a later date, the account for the partnership begins from the commencement of the partnership, and the mere fact that the accounts were open for inspection of partners is not enough.<sup>72</sup> Accounts have to be taken from the commencement, or if some accounts have been settled between the partners, then from that date where balancing in account

<sup>68</sup> *Gadu Kulita v. Joyram*, 26 Cal. 262.

<sup>69</sup> *Sadhu Narayana v. Ramaswamy*, 32 Mad. 203; see also *Lalla Ram v. Sheo Prasad*, 11 A.L.J. 657; *Cala Mal v. Sohara Mal*, 113 P.W.R. 1916.

<sup>70</sup> *Hazi Mahomed v. Dwarka Nath*, 11 C.L.J. 658; followed in *Zohra Bibi v. Zobeda Khatun*, 12 C.L.J. 368.

<sup>71</sup> *Shamkar Lal v. Ram Babu*, 40 All. 416.

<sup>72</sup> *Shawal Ram & Co. v. Tansukhdash Bhupatram & Co.*, 33 C.W.N. 1104 : 1920 Cal. 154. See also *Gokul Krishna v. Sashimukhi*, 16 C.W.N. 299.

book is neither account stated nor settled.<sup>73</sup> Where a new firm based on the old partnership is revived or reconstituted by the consent of all the partners and their legal representatives, for the purpose of accounts it is permissible to go into the accounts of the old partnership on the basis of which the new one is constituted.<sup>74</sup>

**Reopening settled accounts :--** Though a settled account between the partners is a good ground of defence to an action for an account, the court may, in special circumstances, reopen the accounts or give liberty to surcharge and falsify. Settled accounts are not usually reopened *in toto*, except upon the ground of fraud, or numerous and important errors, or mistakes affecting the whole account ; otherwise the court will not usually do more than give liberty to surcharge and falsify. In the absence of fraud, accounts are not reopened in favour of a party who has stood by and acquiesced in them ; but acquiescence in the principle of keeping an account does not amount to acquiescence in the accuracy of the items.<sup>76</sup> Where accounts have been rendered and long acquiesced in, they will not be re-opened except for fraud, though the accounts may be erroneous or no final settlement has been made.<sup>77</sup>

**Necessary parties in suits relating to partnership :**

All partners must be joined in a suit for contribution by one or more partners if the partnership has come to an end and no adjustment has been made.<sup>78</sup> In a suit for accounts of the partnership on the death of a partner, all the representatives of a deceased partner should join.<sup>79</sup> In a suit for dissolution of partnership and for taking accounts, an assignee or the

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<sup>73</sup> *Gokul Krishna v. Sashimukhi*, 16 C.W.N. 299.

<sup>74</sup> *Dayal Chand v. Ram Chand*, 1927 Lah. 249 : 102 I.C. 694 : 9 L.L.J. 119 : 28 P.L.R. 266.

<sup>76</sup> Halsbury, Vol. 22, p. 73, para. 141.

<sup>77</sup> *Gokul Krishna v. Sashimukhi*, 16 C.W.N. 299.

<sup>78</sup> *Cala Mal v. Sohara Mal*, 113 P.W.R. 1916.

<sup>79</sup> *Puthempurayil Bavachutty v. Puthempurayil Kunhi Pathumma*, 33 I.C. 564.



purchaser of the right and interest of one of the partners is a necessary party.<sup>80</sup>

**Position of the parties :—**The position of the parties in a partnership suit is in some particulars different from that of the position of the parties in an ordinary suit (say for money). Thus each of the partners to a partnership suit, however he may be formally ranked, is really in turn the plaintiff and defendant and in both capacities comes before the Court for adjudication of his rights relatively to the other partners which the Court endeavours to determine by its decree. Further, in a partnership case the positions of the parties may be transposed, that is, a defendant may become a plaintiff or one or more defendants may be found entitled with the plaintiff to certain sums of money payable by one or more of the remaining defendants. In such latter case there is one decree divisible in certain fixed proportions among the plaintiff or plaintiffs and the particular defendant or defendants.<sup>81</sup>

**Possible defences :—**The following may be good defences to a partner's action for an account: denial of partnership; illegality, fraud, or forfeiture under a power contained in the articles; laches; a Statute of Limitation; account stated; award, release by deed, or payment and acceptance of money under an agreement amounting to accord and satisfaction.<sup>82</sup>

**Suits between two firms if there is a common partner :—**—Where an individual is a common partner in two houses of trade, no action can be brought by one house against the other house upon any transaction between them while such individual is a common partner. This doctrine is founded on the rule that the same individual, even in two capacities, cannot be both a plaintiff and defendant to one and the same action.<sup>83</sup>

**One suit for different partnerships :—**One suit for settlement of different partnerships consisting of different

<sup>80</sup> *Harrison v. The Delhi and London Bank*, 4 All. 437.

<sup>81</sup> *Arura Mal v. Makhan Mal*. 1930 Lah. 725 : 11 Lah. 359 : 122 I.C. 730 : 31 P.L.R. 258.

<sup>82</sup> Halsbury, Vol. 22, p. 72, para. 140.

<sup>83</sup> *Rustomji v. Seth Purshotamdas*, 25 Bom. 606.

partners does not lie. But accounts of different partnerships can be gone into for other purposes in one suit.<sup>84</sup>

**Account suit in case of novation:**—Where on the death of partner there was a novation and the original partnership business was converted into another business with the consent of the deceased partner's executrix, a suit against the old partners for account on the footing of a continuance of the original partnership is not maintainable.<sup>85</sup>

**Specific prayer for accounts:**—A relief by way of accounts is not in the nature of a general relief and a suit by a partner for a share in one item of the firm assets without a specific prayer for accounts is liable to be dismissed.<sup>86</sup>

**Costs:**—Under ordinary circumstances, the costs of a partnership suit should be paid out of the assets of the partnership,<sup>87</sup> or, in default of assets, by the partners in proportion to their respective shares,<sup>88</sup> unless any partner denies the fact of a partnership, or opposes obstacles to the taking of accounts, and so renders a suit necessary, when he is usually made to pay costs up to the hearing.<sup>89</sup> Negligence or other misconduct by a partner renders him liable for costs of an action so far as it has been occasioned thereby.<sup>90</sup>

**Limitation:**—The limitation for a suit for an account and a share of the profits of a dissolved partnership is three years from the date of the dissolution under Art. 106, Indian Limitation Act. So long, however, as the partnership continues, the statute of limitation does not apply at all between the partners.<sup>91</sup> But as soon as a partnership is dissolved, or there is any exclusion

<sup>84</sup> *Munshilal v. Bishenlal*, 1929 Sind 230 : 118 I.C. 741.

<sup>85</sup> *Jamsetji Nassarwanji v. Hirjibhai Naoroji*, 37 Bom. 158.

<sup>86</sup> *Annamalai v. Annamalai*, 52 I.C. 456 (Mad.).

<sup>87</sup> *Butcher v. Pooler*, (1883) 24 Ch. D. 273, (A.).

<sup>88</sup> *Ross v. White*, (1894) 3 Ch. 326, C.A.

<sup>89</sup> *Ram Chunder v. Manick Chunder*, 7 Cal. 428.

<sup>90</sup> *Hamer v. Giles, Giles v. Hamer*, (1879) 11 Ch. D. 942.

<sup>91</sup> *Gokul v. Sashimukhi*, 16 C.W.N. 299 : 15 C.L.J. 204; *Kassa Mal v. Gopi*, 9 All. 120; *Sudarsanam v. Narastmhulu*, 25 Mad. 149.

of one partner by others, the case is very different and the statute begins to run.<sup>92</sup>

If a partnership has been dissolved and the accounts wound up and the mutual rights and obligations of the partners have been discharged, but afterwards some credit item falls in, it must be divided between the partners in proportion to their shares. If, however, no accounts have been taken, the proper remedy is to have the accounts taken ; if such right is barred by limitation, the partner cannot sue for a share in such credit item.<sup>92a</sup>

**Executing decree after appointment of receiver :—**It is open to any creditor of the partnership to sue the partners and obtain a decree for the recovery of his debt, but no creditor, after the appointment of a Receiver, in a suit for dissolution of the partnership, could execute any decree, obtained after that appointment, to the prejudice of the other creditors of the partnership. To obtain satisfaction of his decree the creditor is bound to go to the Court which had appointed the Receiver and take its directions.<sup>93</sup>

**47.** After the dissolution of a firm the authority of each partner to bind the firm, and the other mutual rights and obligations of the partners, continue notwithstanding the dissolution, so far as may be necessary to wind up the affairs of the firm and to complete transactions begun but unfinished at the time of the dissolution, but not otherwise :

Continuing authority of partners for purposes of winding up.

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<sup>92</sup> *Suddarsanam v. Narastimhulu*, 25 Mad. 149, 164, quoting Lindley ; *Noyes v. Crawley*, 3 De G. J. & Sm. p. 139.

<sup>92a</sup> *Gopala Chetty v. Vijayaraghavacharlar*, (1922) 1 A.C. 488 P.C. 45 Mad. 378 : 49 I.A. 181 : 1922 P.C. 115 : 74 I.C. 621 : 26 C.W.N. 977 : 20 A.L.J. 862 : 43 M.L.J. 305 : 24 Bom. L.R. 1197 ; see also *Haveli Shaw v. Charan Das*, 1929 P.C. 184 ; 115 I.C. 727.

<sup>93</sup> *Shiddlingappa v. Shankarappa*, 28 Bom. 176.

Provided that the firm is in no case bound by the acts of a partner who has been adjudicated insolvent; but this proviso does not affect the liability of any person who has after the adjudication represented himself or knowingly permitted himself to be represented as a partner of the insolvent.

**Old law :—**This section corresponds to sec. 263 of the Indian Contract Act but the authority has been extended to completing transactions begun but unfinished at the time of the dissolution. The proviso is new.

**Continuing authority for winding up :—**The presumption of agency does not exist in the case of a partnership which has ceased to be a going concern,<sup>94</sup> and notice of dissolution terminates the agency. "After the dissolution of a firm or the retirement of a member and notification of the fact, no member of the previously existing firm is, by virtue of his connection therewith, liable for goods supplied to any of his partners subsequently to the notification;<sup>95</sup> nor is he liable on bills or notes subsequently drawn, accepted or indorsed by any of them in the name of the late firm,<sup>96</sup> even although they may have been dated before the dissolution;<sup>97</sup> or have been given for a debt previously owing from the firm<sup>98</sup> by the partner expressly authorised to get in and discharge its debts."<sup>99</sup> There are two exceptions to this—one depends upon the principle of holding out and the other is sec. 47. Notwithstanding dissolution, a partner has implied authority to bind the firm so far as may be necessary to settle and liquidate existing

<sup>94</sup> *Sheo Narain v. Babulal*, 1925 Nag. 268 : 85 I.C. 775.

<sup>95</sup> *Minnitt v. Whinery*, 5 Bro. P.C. 489.

<sup>96</sup> *Ex parte Central Bank of London*, (1892) 2 Q.B. 633; *Paterson v. Zachariah*, 1 Stark. 275; *Abel v. Sutton*, 3 Esp. 108; *Spenceley v. Greenwood*, 1 Fos. & Fin. 297.

<sup>97</sup> *Wrightson v. Pullan*, 1 Stark. 375.

<sup>98</sup> *Kilgour v. Finlyson*, 1 H. Blacks. 156; *Dolman v. Orchard*, 2 Car. & P. 104.

<sup>99</sup> *Kilgour v. Finlyson*, 1 H. Blacks. 156; *Lindley*, p. 285.

demands, and to complete transactions begun, but unfinished, at the time of the dissolution. The implied authority of the partner does not go beyond this and this rule may be considered to be an exception to the general rule contained in section 45 as applied after public notice is given of the dissolution.

**Powers and duties of surviving partners :—**On the death of a partner the surviving partners have a duty to take all steps necessary for the completion of their unperformed engagements,<sup>1</sup> and in such cases, as between the surviving partners and the representatives of the deceased partner, there is an overriding duty to wind up the partnership assets and to do such acts as are necessary for that purpose, and if it is necessary for that winding up either to continue the business, or borrow money or to sell assets, whether those assets are real or personal.<sup>2</sup> Thus when in a partnership of two partners one dies and his interest devolves on his minor son, it is the duty of the surviving partner to wind up the dissolved partnership and for that purpose, if necessary, he is entitled to carry on and continue the business. He is under a duty to realise the assets, fulfil the existing obligations, pay off the debts and ascertain the extent of the surplus property remaining that becomes divisible between the partners.<sup>3</sup> 'Any partner may, it seems, after dissolution, receive a debt and give a release\* or take a bill for it, although the terms of dissolution provide that, as between the partners, the debts should be received by one of them.'<sup>4</sup> A continuing or surviving partner can withdraw a deposit<sup>5</sup> or pledge partnership assets to secure debts

<sup>1</sup> *Hazi Mahomed v. Dwarka Nath*, 11 C.L.J. 658.

<sup>2</sup> *Administrator General of Madras v. Official Assignee*, 32 Mad. 462; *In re Bourne : Bourne v. Bourne*, (1906) 2 Ch. 427.

<sup>3</sup> *Babu v. Gokuldoss*, 1930 Mad 393 : 30 M.L.W. 657 : 57 M.L.J. 404.

\* *Palaniappa v. Vearappa*, 41 Mad. 446; see also *Annamalai v. Annamalai*, 52 I.C. 456 (Mad.).

<sup>4</sup> *King v. Smith*, (1829) 4 C. & P. 108. Halsbury, Vol. 22, p. 98, para 195.

<sup>5</sup> *Dickson v. National Bank of Scotland*, (1917) S.C. (H.L.) 50.

already incurred.<sup>6</sup> Where a firm purchases certain shares but before they are paid for the partners dissolve the partnership, a partner may pledge the shares to the bankers of the firm to raise the purchase money, and may authorise the bankers to sell the shares to indemnify themselves.<sup>7</sup>

**Right of surviving partner to alienate** :—A continuing surviving partner may sell the partnership assets.<sup>8</sup> The right loosely described as “partner’s lien” is conditioned by the undoubted power which a surviving partner possesses to give a valid title to the purchaser in good faith of any specific property belonging to the firm. Where an act is reasonably believed to be done in furtherance of the winding up of the partnership, the surviving partner after dissolution passes an indefeasible title by alienating partnership property.<sup>9</sup>

Although after dissolution of partnership, the managing partner has a right to make collections and put up to sale items of the partnership assets and realise them in the shape of money, still where certain items of the assets are taken over by another firm consisting of two of the important partners of the dissolved firm at a valuation put upon them, the transaction is *prima facie* not binding and the Court is entitled to look into the matter itself.<sup>10</sup>

**Dormant partner** :—The liability of a dormant partner to third parties for acts of his co-partners would not, it seems, be higher under this section than his ordinary liability for such acts. There appears to be some divergence of judicial opinion on the exact liability of a dormant partner. A dormant partner may be liable as an undisclosed principal when he carries on

<sup>6</sup> *Re Clough*, 31 Ch. D. 324.

<sup>7</sup> *Butchart v. Dresser*, 4 D.M.G. 542.

<sup>8</sup> See *Fox v. Hanbury*, Cowp. 446; *Smith v. Stockes*, 1 East. 363; *Smith v. Orrell*, *Ibid.* 368; *Harvey v. Crickett*, 5 M. & S. 336; *Morgan v. Marquis*, 9 Ex. 145.

<sup>9</sup> *Babu v. Gokuldoss*, 1930 Mad. 393 : 30 M.L.W. 657 : 57 M.L.J. 404.

<sup>10</sup> *Muthiah Chetty v. Veerappa*, 52 Mad. 509 : 1929 Mad. 627 : 121 I.C. 498 : 29 M.L.W. 636 : 1929 M.W.N. 345 : 56 M.L.J. 776.

the business by partners or agents.(a) Under sec. 22 if an act is done by the active partner in the trading name of the firm,(b) that is, in his capacity as a member of the firm,(c) the dormant partner would be liable for such acts, and it would be no defence that his name was not mentioned in the document.(d) But there is no mutual agency between a dormant partner who merely supplies capital and takes a share of profits and his other co-partners who carry on the business as principals only.(e) The decision in *Watteau v. Fenwick*,(f) was not a case of partnership. In that case the defendants were undisclosed principals of a hotel manager who had in fact no authority to buy any goods, except a limited class, for the use of the business from any one but the defendants themselves. The plaintiff gave credit to the manager alone and supplied goods not within the excepted class. In these circumstances, it was held that the defendant was liable for all acts of the manager which were within the usual apparent authority of an agent conducting that kind of business, notwithstanding that the plaintiff supposed himself to be dealing with a principal. The objection that in such a case there is no holding out was met by the analogy of a dormant partner. This case was followed in *Kinahan & Co. Ltm. v. Parry*,(g) which was, however, reversed on appeal on the ground that there was no evidence to show the existence of any agency.(h) But these decisions have been doubted by Lord Lindley.(i) It is plain that the dictum is inconsistent with sec. 5 of the English Partnership Act which is only declara-

(a) See *supra*, pp. 95, 96; *Beckham v. Drake*, (1841) 9 M. & W. 79, *supra*, p. 69; *Patterson v. Gandasequi*, 15 East. 62.

(b) *Bunarsee v. Gholam Hossein*, 13 W.R. 29, 30, P.C.

(c) *Ram Chandra v. Kasem Khan*, 28 C.W.N. 824, 828; see *supra*, pp. 70, 71.

(d) See *supra*, pp. 88, 89.

(e) See *supra*, p. 95; *Holme v. Hammond*, (1872) L.R. 7 Ex. at p. 233; see *supra*, p. 86.

(f) (1893) 1 Q.B. 346, see *supra*, p. 85.

(g) (1910) 2 K.B. 399.

(h) *Kinahan v. Parry*, (1911) 1 K.B. 459.

(i) See p. 178, f.n. (g).

tory of the previous law, and on which secs. 18, 19 and 20 of the Indian Partnership Act are based. The decision in *Edmunds v. Bushell*(j) is equally open to doubt.(k) If the dormant partner was not known to the creditor when he lent the money, no credit was given to him and so he cannot look to him for payment, though it would be otherwise if he were known as a partner. Therefore, in order that a dormant partner who was not known to the creditor as a partner, may not be liable for acts of his co-partners done subsequent to his retirement or dissolution, no public notice of the fact is necessary [see provisos to secs. 32 (3) and 45]. The determination of his liability in cases coming under sec. 47 will be guided by the same principles.

But the liability of a dormant partner to third parties for acts of his co-partners should be distinguished from his liability to indemnify his co-partners in respect of payments made and liabilities incurred by them, either before or after dissolution of the firm (secs. 13 and 47), which proceeds upon different grounds.

**48.** In settling the accounts of a firm after dissolution, the following rules shall, subject to agreement by the partners, be observed :—

Mode of settlement of  
accounts between part-  
ners.

- (a) Losses, including deficiencies of capital, shall be paid first out of profits, next out of capital, and, lastly, if necessary, by the partners individually in the proportions in which they were entitled to share profits.
- (b) The assets of the firm, including any sums contributed by the partners to make up deficiencies of capital, shall be applied in the following manner and order :—

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(j) L.R. 1 Q.B. 97.

(k) See *Ram Chandra v. Kaseem Khan*, 28 C.W.N. 824, 829.

(l) See *supra*, p. 86.



- (i) in paying the debts of the firm to third parties ;
- (ii) in paying to each partner rateably what is due to him from the firm for advances as distinguished from capital ;
- (iii) in paying to each partner rateably what is due to him on account of capital ; and
- (iv) the residue, if any, shall be divided among the partners in the proportions in which they were entitled to share profits.

**Settlement of account :—**This is the “accounting clause” and is most important. It is copied with only very slight verbal alterations from section 44 of the English Act which has stood with success the incessant and vigilant scrutiny of lawyers, accountants and businessmen in England for nearly forty years.<sup>11</sup> If the assets are not sufficient to pay the debts and liabilities to non-partners, the partners must treat the difference as a loss and make it up by contributions *inter se*. If the assets are more than sufficient to pay the debts and liabilities of the partnership to non-partners, but are not sufficient to repay the partners their respective advances, the amount of unpaid advances ought to be treated as a loss, to be met like other losses. In such a case the advances ought to be treated as a debt of the firm, but payable to one of the partners instead of to a stranger. If, after paying all the debts and liabilities of the firm and the advances of the partners, there is still a surplus, but not sufficient to pay each partner his capital, the balances of capitals remaining unpaid must be treated as so many losses to be met like other losses.<sup>12</sup>

Where partners agree to contribute capital in unequal shares but to divide the profits equally, and the assets prove

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<sup>11</sup> Notes on clauses.

<sup>12</sup> Lindley, pp. 720, 721.

insufficient to make good the capital, each partner is treated as liable to contribute an equal share of the deficiency, and then the assets are applied in paying to each partner rateably what is due to him from the firm in respect of capital.<sup>13</sup>

**49.** Where there are joint debts due from the firm, and also separate debts due from any partner, the property of the firm shall be applied in the first instance in payment of the debts of the firm, and, if there is any surplus, then the share of each partner shall be applied in payment of his separate debts or paid to him. The separate property of any partner shall be applied first in the payment of his separate debts, and the surplus (if any) in the payment of the debts of the firm.

**Old law** :—This section reproduces sec. 262 of the Indian Contract Act.

**Payment of joint and separate debts** :—“The joint estate is to be applied in payment of the joint debts, and the separate estates in payment of the separate debts, any surplus there may be of either estate being carried over to the other”.<sup>14</sup> When there are assets sufficient to pay all the creditors, the estate of the deceased forms one fund, out of which the joint and separate creditors are paid *pari passu*; but they, and the funds for their payment, are distinguished when the assets are in any way deficient.<sup>15</sup>

Any disposition of property by agreement of the partners is effective unless made with a view to defraud the creditor, and the creditor is not entitled to be consulted in the matter.<sup>16</sup>

<sup>13</sup> *Garner v. Murray*, (1904) 1 Ch. 57. Halsbury, Vol. 22, p. 103, para. 206.

<sup>14</sup> *Lodge v. Prichard*, 1 D.J.S. 613, 614; also *Rolfe v. Flower*, L.R. 1 P.C. 48; *Ex parte Dear*, (1877) 1 Ch. Div. 519; *Ex parte Morley*, (1873) L.R. 8 Ch. 1032; *Twiss v. Massey*, 1 Atk. 67.

<sup>15</sup> *Lindley*, p. 739; see also *Ridgway v. Clare*, 19 Beav. 111.

<sup>16</sup> *Jamnadas v. Ramadhar*, 1922 Nag. 70 : 64 I.C. 719 : 18 N.L.R. 186.

**50.** Subject to contract between the partners, the provisions of clause (a) of section 16 shall apply to transactions by any surviving partner or by the representatives of a deceased partner, undertaken after the firm is dissolved on account of the death of a partner and before its affairs have been completely wound up :

Provided that where any partner or his representative has bought the goodwill of the firm, nothing in this section shall affect his right to use the firm name.

**Profits after dissolution :—**This section follows from the principle that an agent cannot make any profit for himself out of the principal's business, and is an application of the rule contained in sec. 17 (a) to transactions subsequent to dissolution of partnership but before its affairs are completely wound up. When a partnership has been dissolved by death, or bankruptcy or otherwise, the relation existing between the surviving partner and his former partner is a fiduciary relation.<sup>17</sup> So if after the death of a partner a lease taken by a firm expires before the affairs of the firm are completely wound up and the surviving partner renews it, it becomes a partnership property.<sup>18</sup> Surviving partners who carry on the business must account for the profits of the share of a deceased partner up to the time of liquidation of assets.<sup>19</sup>

Where therefore on the death of one partner, the surviving partner continued the business, he was held to be liable to give to the representatives of the deceased partner a share in the profits of the business which may have accrued subsequent to the death of the deceased partner. The profits may well be regarded as accretions to the property which has yielded them and ought to belong to the owner of the property, in accordance

<sup>17</sup> *Babu v. Gakuldoss*, 1930 Mad. 393 : 30 M.L.J. 657 : 57 M.L.J. 404

<sup>18</sup> *Clements v. Hall*, 2 De G. & J. 173.

<sup>19</sup> *Vyse v. Foster*, L.R. 7 H.L. 318; *Horder v. Horder*, (1910) A.C.

with the maxim *accessorium secuitur suum principale*, the accessory right follows the principal.<sup>20</sup> So on equitable principle which is embodied in this section the plaintiff is entitled to his share of the profits made by the defendants in selling goods which were ordered and paid for before the dissolution but were received after it.<sup>21</sup>

Where on a dissolution of a partnership, one of the partners retains assets of the firm in his hands without any settlement of account, and applies them in continuing the business for his own benefit, he may be ordered to account for such assets with interest thereon apart from fraud or misconduct in the nature of fraud.<sup>22</sup>

**Contract to the contrary :—**The provisions of this section are subject to contract to the contrary. Therefore, if a partner agrees that when he dies or retires his capital shall remain in the business at interest, those who carry on that business will be accountable for the capital and interest, and nothing more.<sup>23</sup>

**51.** Where a partner has paid a premium on entering into partnership for a fixed term, and the firm is dissolved before the expiration of that term otherwise than by the death of a partner, he shall be entitled to repayment of the premium or of such part thereof as may be reasonable, regard being had to the terms upon which he became a partner and to the length of time during which he was a partner, unless—

Return of premium on  
premautre dissolution.

(a) the dissolution is mainly due to his own misconduct, or

<sup>20</sup> *Mahomed Kamel v. Haji Hedayetullah*, 48 Cal. 906 : 26 C.W.N. 463 : 33 C.L.J. 411 : 1922 Cal. 122 : 64 I.C. 861; *Ahmed Musafi v. Hashim Ebrahim*, 42 Cal. 914, 925.

<sup>21</sup> *Janki Pershad v. Pt. Sameshar*, 1923 Oudh 23 : 74 I.C. 324 : 9 O.L.J. 599.

<sup>22</sup> *Ahmed Musafi v. Hashim Ebrahim*, 42 Cal. 914 P.C.

<sup>23</sup> *Vyse v. Foster*, L.R. 7 H.L. 318.

(b) the dissolution is in pursuance of an agreement containing no provision for the return of the premium or any part of it.

**Return of premium:**—In order that a partner may claim return of premium on dissolution, (i) the dissolution must not be mainly due to his own misconduct ; but incompetence is not misconduct.<sup>24</sup> The misconduct must be such as to amount to a complete repudiation of the contract of partnership ;<sup>25</sup> and (ii) if the dissolution takes place in pursuance of an agreement, it contains a provision for the return of the premium, either in whole or in part. The Court may order under this section in the absence of any agreement regulating the matter, or waiver, or release express or implied.

Death is an ordinary contingency which must be deemed to be in contemplation of the parties at the time of entering into partnership and so this section provides that return of the premium cannot be claimed if the dissolution takes place as a result of death.

Bankruptcy of the partner receiving the premium has been held in England to be a similar bar<sup>26</sup> though not when the partner claiming return did not know at the commencement of the partnership that the partner receiving it was in embarrassed circumstances.<sup>27</sup> Again, if the bankruptcy of the partner paying the premium results as a consequence of a petition filed by the partner receiving the premium and dissolution follows before the expiry of the stipulated term, the former is entitled to a return of that portion of the premium as the Court thinks fit.<sup>28</sup>

Return of premiums may be claimed even if there are faults on both sides.<sup>29</sup> Similarly, where dissolution follows as a result

<sup>24</sup> *Atwood v. Maude*, (1868) 3 Ch. App. 369; *Brewer v. Yorke*, (1882) 46 L.T. 289, A.C.

<sup>25</sup> *Wilson v. Johnstone*, 16 Eq. 606.

<sup>26</sup> *Akhurst v. Jackson*, 1 Swanst. 85.

<sup>27</sup> *Freeland v. Stansfeld*, 2 Sm. & G. 479.

<sup>28</sup> *Hamil v. Stokes*, 4 Price, 161.

<sup>29</sup> *Astle v. Wright*, (1836) 23 Beav. 77; *Pease v. Hewitt*, (1862) 32 Beav. 22.

of quarrel between the partners return of proportionate premium may be claimed even where the person claiming it is also to blame.<sup>30</sup>

Where a partner sues another for the dissolution of partnership and return of the premium paid to him, the partner receiving it is entitled to retain only so much of the premium as bears the same proportion to its whole amount as the time for which the partnership has actually lasted bears to the whole term first agreed upon.<sup>31</sup> That is, the partner paying the premium is entitled to the return of such part of it as bears to the whole sum which the unexpired period of the term bears to the whole term.<sup>32</sup> But this rule does not in proper cases affect the discretion of the Court.<sup>33</sup>

Where after the expiry of some period of the term the partnership is dissolved by consent but no agreement is then made for the return of any part of the premium, claim for the same cannot be entertained.<sup>34</sup>

If premium is paid by a partner on entering into a partnership at will, none, as a general rule, is returnable, in the absence of fraud, or of an express stipulation on the point.<sup>35</sup>

## 52. Where a contract creating partnership is

Rights where partnership contract is rescinded for fraud or misrepresentation. rescinded on the ground of the fraud or misrepresentation of any of the parties thereto, the party entitled to rescind is, without prejudice to any other right, entitled—

- (a) to a lien on, or a right of retention of, the surplus of the assets of the firm remain-

<sup>30</sup> *Bury v. Allen*, 1 Coll. 589; *Atwood v. Maude*, 3 Ch. 369.

<sup>31</sup> *Bury v. Allen*, 1 Coll. 589; *Astle v. Wright*, 23 Beav. 77; *Pease v. Hewitt*, 31 Beav. 22; *Wilson v. Johnstone*, 16 Eq. 606; *Pollock*, p. 129.

<sup>32</sup> *Atwood v. Maude*, (1863) L.R. 3 Ch. 369.

<sup>33</sup> *Bullock v. Crockett*, (1862) 3 Giff. 507.

<sup>34</sup> *Lee v. Page*, 30 L.J. Ch. 857.

<sup>35</sup> *Halsbury*, Vol. 22, p. 96, para. 190.

ing after the debts of the firm have been paid, for any sum paid by him for the purchase of a share in the firm and for any capital contributed by him ;

(b) to rank as a creditor of the firm in respect of any payment made by him towards the debts of the firm ; and

(c) to be indemnified by the partner or partners guilty of the fraud or misrepresentation against all the debts of the firm.

### **Fraud or misrepresentation in contract of partnership :**

—Sections 17 and 18 of the Contract Act contain the definition of fraud and misrepresentation respectively and section 19 states that when consent to an agreement is caused by fraud or misrepresentation, the agreement is a contract voidable at the option of the party whose consent was so caused. If there is fraud in the inception of a partnership agreement, the fact that the plaintiff in a suit for rescission of the agreement, could have discovered the truth, for example, by examination of the partnership books, is not necessarily a bar to relief.<sup>36</sup>

Partnership contracts are sometimes considered to be contracts *uberremae fidei* which require a full disclosure of all material facts by one contracting party to another and such a contract may be invalidated by non-disclosure of a material fact. Anson, however, considers that partnership contracts are erroneously considered to be such.

Alternative claims may be made for dissolution and rescission of the partnership contract.<sup>37</sup>

The remedies open to the party who has been the subject of fraud or misrepresentation as detailed in clauses (a), (b) and (c) are concurrent and not mutually exclusive.

When a partnership is rescinded on the ground of fraud or misconduct the partner at fault is not entitled to ask his

<sup>36</sup> *Rawlins v. Wilkham, Wickham v. Rawlins*, (1858) 1 Giff. 355.

<sup>37</sup> *Bagot v. Easton*, (1877) 7 Ch. D. 1, C.A.

co-partners to contribute to the losses which may have occurred in the partnership business.<sup>38</sup>

**53.** After a firm is dissolved, every partner or his representative may, in the absence of a contract between the partners to the contrary, restrain any other partner or his representative from carrying on a similar business in the firm name or from using any of the property of the firm for his own benefit, until the affairs of the firm have been completely wound up :

Provided that where any partner or his representative has bought the goodwill of the firm, nothing in this section shall affect his right to use the firm name.

**Preventing use of firm name or property :—**This section is complementary to section 50 which does not prevent a partner from using the firm connection or property for his private ends during the winding up, but requires him to account for the profits he obtains thereby. The rule of law contained in this section was laid down in *Re David and Matthews*<sup>39</sup> and follows the principles stated in section 54. The section gives a power to the other partners or their representatives to prevent any partner absolutely from using the firm name or property until the winding up is completed.

**54.** Partners may, upon or in anticipation of the dissolution of the firm, make an agreement that some or all of them will not carry on a business similar to that of the firm within a specified period or within specified local limits; and notwithstanding anything contained in section 27 of the Indian Contract

Agreements in restraint of trade.

<sup>38</sup> *Gola Singh v. Hakam Rai*, 60 I.C. 709 : 1921 Lah. 130 : 3 L.L.J. 106 : 28 P.L.R. 1921.

<sup>39</sup> (1899) 1 Ch. 378.



Act, 1872, such agreement shall be valid if the restrictions imposed are reasonable.

This section is a counter part of sec. 36 (2) which relates to agreements with an outgoing partner whereas this section relates to agreements upon dissolution or in its anticipation.

**55.** (1) In settling the accounts of a firm after dissolution, the goodwill shall, Sale of goodwill after dissolution. subject to contract between the partners, be included in the assets, and it may be sold either separately or along with other property of the firm.

(2) Where the goodwill of a firm is sold after dissolution, a partner may carry on Rights of buyer and seller of goodwill. a business competing with that of the buyer and he may advertise such business, but, subject to agreement between him and the buyer, he may not—

(a) use the firm name,

(b) represent himself as carrying on the business of the firm, or

(c) solicit the custom of persons who were dealing with the firm before its dissolution.

(3) Any partner may, upon the sale of the goodwill of a firm, make an agreement Agreements in restraint of trade. with the buyer that such partner will not carry on any business similar to that of the firm within a specified period or within specified local limits, and, notwithstanding anything contained in section 27 of the Indian Contract Act, 1872, such agreement shall be valid if the restrictions imposed are reasonable.

**Sale of goodwill :—**This section is not an exhaustive codification of all the judicial rulings on the difficult subject

of goodwill. It includes only the outstanding rules. Its one aspect has been treated in section 36.

The term "goodwill" has been defined in various ways, but never quite successfully and no definition has been given in the section. It is sufficient that there is an intangible but valuable thing attached to a healthy business which is known to all as the "goodwill of the business". Lindley describes it as "generally used to denote the benefit arising from connection and reputation ; and its value is what can be got for the chance of being able to keep up that connection and improve it."<sup>40</sup>

(1) Section 14 includes the goodwill of the business in the property of the firm. Sub-section (i) of this section re-asserts this from a particular point of view, and requires that the goodwill of the business shall be sold like any other part of the property of the firm when the affairs of the firm are wound up, either along with other property or separately. The definite inclusion of goodwill as a part of the property of the firm renders this sub-section a short and inevitable further step, but it is in accordance with the English law,<sup>41</sup> and the Indian cases.<sup>42</sup>

**Valuation of goodwill :—**Goodwill is generally valued at so many years purchase on the amount of the profits. And these annual profits are generally calculated on an average of three years.<sup>43</sup> The effectiveness of possible or probable competition should be one of the main determining factors in the valuation of goodwill,<sup>44</sup> and the value of goodwill is enhanced if the outgoing partners contract not to carry on a similar business.<sup>45</sup> Where

<sup>40</sup> Lindley, pp. 534, 535.

<sup>41</sup> *Jennings v. Jennings*, (1898) 1 Ch. 378, 389; *Hill v. Fearn*, (1905) 1 Ch. 466; *In re David and Matthews*, (1899) 1 Ch. 378.

<sup>42</sup> *Suleman v. Abdul Latif*, 34 C.W.N. 737 : 1930 P.C. 185 : 1930 A.L.J. 868 P.C.; *Ramakrishna v. Muthu Swami*, 52 Mad. 672 : 1929 Mad. 456 : 121 I.C. 609 : 29 M.L.W. 560 : 56 M.L.J. 657.

<sup>43</sup> *Davis v. Hodgson*, (1858) 119 R.R. 379; *Page v. Ratcliffe*, (1896) 75 L.T.R. 371; *Von Au v. Magenheimer*, 115 App. Div. 84; *Haji Abdul Latif v. Suleman*, 1929 Sind 85 : 110 I.C. 639 : 23 S.L.R. 471.

<sup>44</sup> *Haji Abdul Latif v. Suleman*, 1929 Sind 85 : 110 I.C. 639 : 23 S.L.R. 471.

<sup>45</sup> *Cooper v. Watson*, (1784) 3 Doug. (K.B.) 413; *Kennedy v. Lee*, (1817) 3 Mer. 441, 445.

according to agreement a partner takes over the assets on dissolution, the goodwill must be valued on the footing that the outgoing partner is entitled to carry on a similar business.<sup>46</sup>

**Contract to the contrary :—**But this section is subject to contract to the contrary and therefore there may be a provision in the articles which entitles surviving partners to retain the benefit of the goodwill subject to the payment of a share of profits to the estate of the deceased partner.<sup>47</sup> And there may be a provision in the articles that goodwill shall not be valued on the assets being taken over by a surviving partner.<sup>48</sup>

As the operation of this section is subject only to contract to contrary, on the sale of a partnership business the goodwill<sup>49</sup> and trade marks used in connection with the business<sup>50</sup> pass without express mention.<sup>50a</sup>

**(2) Rights retained by seller :—**Sub-section (2) contains the important proposition defining the rights which are ordinarily retained by the seller of a goodwill. In spite of the sale of goodwill of a firm, any partner may set up a competing business in his own name<sup>51</sup> alongside the old premises of the firm, and may even advertise the business,<sup>52</sup> but not under the name of the former firm nor as continuing or succeeding to the same business.<sup>53</sup> In cases where a sale of goodwill is directed by the Court, "no Court can prevent the late partners from engaging in the same business, and therefore the sale cannot proceed upon

<sup>46</sup> *Reynolds v. Bullock*, (1878) 26 W.R. 678; *Hall v. Barrows*, (1863)

4 De G. J. & Sm. 150.

<sup>47</sup> *Smith v. Nelson*, (1905) 92 L.T. 313.

<sup>48</sup> *Hordern v. Hordern*, (1910) A.C. 465 P.C.

<sup>49</sup> *Shipwright v. Clements*, (1871) 19 W.R. 599 (Eng.); *Kingston, Miller & Co. v. Thomas Kingston & Co.*, (1912) 1 Ch. 575.

<sup>50</sup> *Shipwright v. Clements*, (1871) 19 W.R. 599 (Eng.); *Hall v. Barrows*, (1863) 4 De G. J. & Sm. 150.

<sup>50a</sup> Halsbury, Vol. 22, pp. 106, 107, para. 214.

<sup>51</sup> *Shackle v. Baker*, (1808) 14 Ves. 468; *Harrison v. Gardner*, (1817) 2 Madd. 198, 221.

<sup>52</sup> *Kennedy v. Lee*, 3 Mer. 452; *Hookham v. Pottage*, 8 Ch. 91.

<sup>53</sup> *Churton v. Douglas*, (1859) Johns. 174.

the same principles as if a Court could prevent their so engaging."<sup>54</sup>

Things which the seller cannot do are given in clauses (a), (b) and (c) of the sub-section. (a) He may not use the firm-name<sup>55</sup> as the right goes to the purchaser<sup>56</sup> 'so long and so far as he does not by so doing expose him to any liability'<sup>57</sup> by holding out that the vendor is still in the business and personally liable,<sup>58</sup> e.g., when his name is A.B. and the name of the firm is A.B. & Co. (b) He may not represent himself as succeeding to the business of the firm.<sup>59</sup> (c) He may not solicit old customers of the firm<sup>60</sup> though he may deal with the customers of the old firm<sup>61</sup> when they willingly continue to deal with him.<sup>62</sup>

These propositions are fairly simple, and follow naturally from the sale of the goodwill of the business; for, though the seller is entitled to carry on a competing business, yet he must not do so in a way by which he would derive any direct benefit from his connection with the business goodwill of which he has sold for value. It may be noted that the Act does not include the proposition of the English law that where a partner has been adjudicated insolvent, he is not prevented from soliciting the old customers of the firm. This is based on *Crutwell v. Lye*,<sup>63</sup> and *Walker v. Mottram*,<sup>64</sup> which are derived from the general consideration that the insolvent's share in the assets of the firm, including the goodwill, is sold over his head, for the benefit of his creditors, and he himself is in no way privy to

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<sup>54</sup> *Cook v. Collingridge*, see 27 Beav. 456.

<sup>55</sup> *Thurton v. Douglas*, Johns. 174.

<sup>56</sup> *Levy v. Walker*, (1879) 10 Ch. Div. 436; *Re David Matthews*, (1899) 1 Ch. 378; *Barnes v. Gibson*, (1865) 34 Beav. 566, 569.

<sup>57</sup> *Thynne v. Shove*, (1890) 45 Ch. Div. 577, 582.

<sup>58</sup> *Ibid*; *Churton v. Douglas*, Johns. 174; *Townshend v. Jarman*, (1900) 2 Ch. 698; *Burchell v. Wilde*, (1900) 1 Ch. 551, C.A.

<sup>59</sup> *Ibid*.

<sup>60</sup> *Trego v. Hunt*, (1896) A.C. 7; *Labouchere v. Dawson*, (1872) L.R.

<sup>13</sup> Eq. 322.

<sup>61</sup> *Leggott v. Barrett*, (1880) 15 Ch. D. 306, 310, 313, 315, C.A.

<sup>62</sup> *Curl Bros. v. Webster*, (1904) 1 Ch. 685.

<sup>63</sup> 17 Ves. 335.

<sup>64</sup> 19 Ch. D. 355.

the sale and should not therefore be bound by a condition which amounts to a personal undertaking. As a better rule the value of goodwill has been left unimpaired, for the benefit of the creditors of the insolvent. The English rulings go further than this and would extend the rule in *Crutwell v. Lye* to expelled partners, and to sales by a Court in an action for dissolution and sales by a trustee of a deed of assignment for the benefit of creditors.<sup>65</sup> But in these cases the sale usually follows from what was originally a voluntary act by the seller and the seller derives some benefit from the sale. It was thought undesirable to define and elaborate the new statutory rules to this extent. In any case, these matters are expressed to be subject to agreement by the buyer and the partner concerned, and where there is no agreement, any loss to the seller arising from the absence of these refinements, which are all in favour of the seller, will be balanced by the enhanced value of the goodwill.<sup>66</sup>

If upon a dissolution the right of having the partnership assets, including the goodwill, sold for common benefit is waived, or if the terms of dissolution are such as to preclude its exercise, then each partner can not only carry on business in competition with the others, but each can represent himself as late of, or as successor to, the old firm: and each may use the old name without qualification if he does not hold out the other partners as still in the partnership with himself,<sup>66a</sup> that is, unless such user does not expose the other partners to risk of liability.<sup>67</sup>

The law is thus stated in Halsbury:—The sale of the goodwill of a business, in the absence of contrary agreement, includes the right to use the name of the firm, unless such use is calculated to lead the public to believe that the vendor is still carrying it on and thus to subject him to liability. Where, however, goodwill is assigned but the actual use of the name is not assigned, the rights arising from the assignment are qualified by limiting

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<sup>65</sup> Lindley, p. 537, footnote d.

<sup>66</sup> Notes on clauses.

<sup>66a</sup> Lindley, p. 544.

<sup>67</sup> *Webster v. Webster*, (1791) 3 Swan. 490n.

the use of the name to which the goodwill is annexed, so as not to impose a personal liability on the assignors. If the goodwill is not sold, each partner may use the name of the firm, if he does not by doing so hold out the other partners as being still partners with him. If a partner agrees to retire and his partners buy his share but do not take any express assignment of the goodwill, they are not entitled to continue the use of his name as part of the style of the firm ; and where a business is carried on under the name, solely or with any addition, of an outgoing partner who is still living and not bankrupt, a purchaser of the business including the goodwill is not entitled to use the name of the outgoing partner in such a way as to suggest that he is still connected with the business, unless the right to use the firm name is expressly assigned.<sup>68</sup>

**(3) Agreement in restraint of trade :—**Sub-section (3) as with sub-section (2) of section 36, is a modification of the general rule that each partner may carry on a business competing with that of which the goodwill has been sold, and is derived from Explanation 1 to section 27 of the Indian Contract Act.<sup>69</sup> A covenant unlimited as regards space not to carry on business in a specified name is not void as being in restraint of trade.<sup>70</sup>

## CHAPTER VII.

### REGISTRATION OF FIRMS.

**56.** The Governor General in Council may, by notification in the Gazette of India, direct that the provisions of this Chapter shall not apply to any province or to any part thereof specified in the notification.

Power to exempt from application of this Chapter.

<sup>68</sup> Halsbury, Vol. 22, pp. 104, 105, para. 210.

<sup>69</sup> Notes on clauses.

<sup>70</sup> *Vernon v. Hallam*, (1886) 34 Ch. D. 748, 751.

This section gives power to the Governor General in Council to exempt from the provisions of this Chapter any undeveloped area to which its provisions may not be suited.

**57.** (1) The Local Government may appoint Registrars of Firms for the purposes of this Act, and may define the areas within which they shall exercise their powers and perform their duties.

(2) Every Registrar shall be deemed to be a public servant within the meaning of section 21 of the Indian Penal Code.

**58.** (1) The registration of a firm may be effected at any time by sending by post or delivering to the Registrar of the area in which any place of business of the firm is situated or proposed to be situated, a statement in the prescribed form and accompanied by the prescribed fee, stating—

- (a) the firm name,
- (b) the place or principal place of business of the firm,
- (c) the names of any other places where the firm carries on business,
- (d) the date when each partner joined the firm,
- (e) the names in full and permanent addresses of the partners, and
- (f) the duration of the firm.

The statement shall be signed by all the partners, or by their agents specially authorised in this behalf.

(2) Each person signing the statement shall also verify it in the manner prescribed.

(3) A firm name shall not contain any of the following words, namely :—

“Crown”, “Emperor”, “Empress”, “Empire”, “Imperial”, “King”, “Queen”, “Royal”, or words expressing or implying the sanction, approval or patronage of the Crown or the Government of India or a Local Government, except when the Governor General in Council signifies his consent to the use of such words as part of the firm name by order in writing under the hand of one of the Secretaries of the Government of India.

**Contents of the application** :—Sub-clause (i) is based on section 3 of the Registration of Business Names Act, 1916 (6 and 7 George V c. 58) but it reduces the particulars to be furnished to the minimum required for the information and benefit of third parties. Nothing of the internal economy of the firm need be disclosed beyond the mere names of the partners, and the duration of their partnership.<sup>71</sup>

**(3) Choice of name** :—An ‘individual may carry on business under any name and style he may choose to adopt’\* so long as he does not intentionally deceive the public into believing that they are dealing with some one else even if the name happens to be his own.† The reason of the prohibition with regard to the use of certain names is that third parties may not be induced to deal with the firm believing it to have royal or governmental sanction, approval or patronage.

**59.** When the Registrar is satisfied that the provisions of section 58 have been  
 Registration. duly complied with, he shall record

<sup>71</sup> Notes on clauses.

\* Erle, C.J., *Maughan v. Sharpe*, (1864) 17 C.B.N.S. 462.

† *Holloway v. Holloway*, (1850) 13 Beav. 209.



an entry of the statement in a register called the Register of Firms, and shall file the statement.

**No discretionary power of Registrar :—**In connection with this and the succeeding sections two points should be noted : (1) The Registrar is a mere recording officer and the entries he makes in the Register will contain only the facts, or alleged facts, of which he is given notice. So long as any statement or notice is formally correct he has no discretion but to record them in the Register of Firms. (2) In addition to making the necessary entries in the Register of Firms, he is required to file the original of every document submitted to him. The original statement and all subsequent statements and notices will be filed together, so that all original papers relating to any firm will be conveniently found together in one file.<sup>72</sup>

**60.** (1) When an alteration is made in the firm name or in the location of the principal place of business of a registered firm, a statement may be sent to the Registrar accompanied by the prescribed fee, specifying the alteration, and signed and verified in the manner required under section 58.

(2) When the Registrar is satisfied that the provisions of sub-section (1) have been duly complied with, he shall amend the entry relating to the firm in the Register of Firms in accordance with the statement, and shall file it along with the statement relating to the firm filed under section 59.

**Amendment of the Register :—**The section relates to the recording of alterations in the firm name and the principal place of business of the firm, and it requires the same degree of formality as is required for the original statement under sec. 58.<sup>73</sup>

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<sup>72</sup> Notes on clauses.

<sup>73</sup> Notes on clauses.

**61.** When a registered firm discontinues business at any place or begins to carry on business at any place, such place not being its principal place of business, any partner or agent of the firm may send intimation thereof to the Registrar, who shall make a note of such intimation in the entry relating to the firm in the Register of Firms, and shall file the intimation along with the statement relating to the firm filed under section 59.

**Closing and opening of branches :—**This section relates to the noting in the Register of the closing and opening of branches. This is a less important matter and the section permits of the notice being sent by any partner or agent of the firm. It may be noted that secs. 61 and 62 speak of agent but not specially authorised agent as is mentioned in secs. 58 and 63.

**62.** When any partner in a registered firm alters his name or permanent address, an intimation of the alteration may be sent by any partner or agent of the firm to the Registrar, who shall deal with it in the manner provided in section 61.

This is also performed in a less formal manner.

**63.** (1) When a change occurs in the constitution of a registered firm any incoming, continuing or outgoing partner, and when a registered firm is dissolved any person who was a partner immediately before the dissolution or the agent of any such partner or person specially authorised in this behalf, may give notice to the Registrar of such change or dissolution, specifying the date thereof; and the Registrar shall

Noting of closing and opening of branches.

Noting of changes in names and addresses of partners.

Recording of changes in and dissolution of a firm.

make a record of the notice in the entry relating to the firm in the Register of Firms, and shall file the notice along with the statement relating to the firm filed under section 59.

(2) When a minor who has been admitted to the benefits of partnership in a firm attains majority and elects to become or not to become a partner, and the firm is then a registered firm, he, or his agent specially authorised in this behalf, may give notice to the Registrar that he has or has not become a partner, and the Registrar shall deal with the notice in the manner provided in sub-section (1).

Recording of withdrawal of a minor with-

**Recording changes and dissolution :—**Sub-section (1) should be read with sections 32, 33, 45 and 72. These are important matters but as the law of partnership allows notice to customers to be given by any partner, this section gives the same right, and does not require these important matters to be notified by all the partners acting together.<sup>74</sup> The notice may also be given by the partner's agent or any person specially authorised in that behalf.

Sub-section (2) should be read with sections 30 and 72.

**64.** (1) The Registrar shall have power at all times to rectify any mistake in order to bring the entry in the Register of Firms relating to any firm into conformity with the documents relating to that firm filed under this Chapter.

Rectification of mistakes.

(2) On application made by all the parties who have signed any document relating to a firm filed under this Chapter, the Registrar may rectify any mistake in

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<sup>74</sup> Notes on clauses.

such document or in the record or note thereof made in the Register of Firms.

**Power to rectify mistakes :—**The power to rectify clerical errors extends to errors made by the Registrar himself as well as to errors made by persons sending him statements or notices.

**65.** A Court deciding any matter relating to a registered firm may direct that the Registrar shall make any amendment in the entry in the Register of Firms relating to such firm which is consequential upon its decision; and the Registrar shall amend the entry accordingly.

Amendment of Register by order of Court.

**Order of amendment by Court :—**The Registrar is a mere recording officer. He has no power to enter into accuracy of the statements contained in any document sent to him. The power of correction is given to the civil courts in case of dispute.

**66.** (1) The Register of Firms shall be open to inspection by any person on payment of such fee as may be prescribed.

Inspection of Register and filed documents.

(2) All statements, notices and intimations filed under this Chapter shall be open to inspection, subject to such conditions and on payment of such fee as may be prescribed.

**Inspection by public :—**Sub-section (2) aims at avoiding untrammelled inspection by any member of the public of important original documents.

**67.** The Registrar shall on application furnish to any person, on payment of such fee as may be prescribed, a copy, certified under his hand, of any entry or portion thereof in the Register of Firms.

Grant of copies.

**Certified copies:**—The right to obtain a certified copy of an entry in the Register does not extend to original documents.

**68.** (1) Any statement, intimation or notice recorded or noted in the Register of Firms shall, as against any person by whom or on whose behalf such statement, intimation or notice was signed, be conclusive proof of any fact therein stated.

Rules of evidence.

(2) A certified copy of an entry relating to a firm in the Register of Firms may be produced in proof of the fact of the registration of such firm, and of the contents of any statement, intimation or notice recorded or noted therein.

**Conclusive proof by certified copies :**—In proof of the factum of registration and of the contents of any statement, intimation or notice recorded or noted therein, a certified copy of the entry is enough. This section is intended to afford a strong protection to persons dealing with firms against false denials of partnership and the evasion of liability by the substantial members of a firm.

**69.** (1) No suit to enforce a right arising from a contract or conferred by this Act shall be instituted in any Court by or on behalf of any person suing as a partner in a firm against the firm or any person alleged to be or to have been a partner in the firm unless the firm is registered and the person suing is or has been shown in the Register of Firms as a partner in the firm.

Effect of non-registration.

(2) No suit to enforce a right arising from a contract shall be instituted in any Court by or on behalf of a firm against any third party unless the firm is

registered and the persons suing are or have been shown in the Register of Firms as partners in the firm.

(3) The provisions of sub-sections (1) and (2) shall apply also to a claim of set-off or other proceeding to enforce a right arising from a contract, but shall not affect—

(a) the enforcement of any right to sue for the dissolution of a firm or for accounts of a dissolved firm, or any right or power to realise the property of a dissolved firm, or

(b) the powers of an official assignee, receiver or Court under the Presidency-towns Insolvency Act, 1909, or the Provincial Insolvency Act, 1920, to realise the property of an insolvent partner.

(4) This section shall not apply—

(a) to firms or to partners in firms which have no place of business in British India, or whose places of business in British India are situated in areas to which, by notification under section 55, this Chapter does not apply, or

(b) to any suit or claim of set-off not exceeding one hundred rupees in value which, in the Presidency-towns, is not of a kind specified in section 19 of the Presidency Small Cause Courts Act, 1882, or, outside the Presidency-towns, is not of a kind specified in the Second Schedule to the Provincial Small Cause Courts Act, 1887, or to any proceeding in execution or other

proceeding incidental to or arising from any such suit or claim.

**Effect of non-registration :—**The Act makes registration optional and imposes no penalty for non-registration. But though registration lies entirely within the discretion of the firm or partner concerned, any firm which is not registered will be unable, *except in cases mentioned in sub-section 4,\** to enforce its claims against third parties in the Civil Courts ; and any partner who is not registered will be unable to enforce his claims either against third parties or against his fellow partners. One exception to this disability is made—any unregistered partner in any firm, registered or unregistered, may sue for dissolution of the firm. This exception is made on the principle that registration is designed primarily to protect third parties, and the absence of registration need not prevent the disappearance of an unregistered or imperfectly registered firm. Under this scheme a small firm, or a firm created for a single venture, not meeting with difficulty in getting payment, need never register ; and even a firm with a large business need not register until it is faced with litigation. Registration may then be effected at any time before the suit is instituted. The rights of third parties to sue the firm or any partner are left in tact.

If a partner newly introduced into the firm fails to register he will incur a grave risk of being unable to claim his dues from his partners, and will have to rely solely on their good faith or sue for dissolution. A third party who deals with a firm and knows that a new partner has been introduced can either make registration of the new partner a condition for further dealings, or content himself with the certain security of the other partners and the chance of proving by other evidence the partnership of the new but unregistered partner. A third party who deals with a firm without knowing of the addition of a new partner counts on the credit of the old partners only, and will not be prejudiced by the failure of the new partner to register.

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\* Subsequently incorporated in the Section.

As regards the outgoing partner the Act provides that the estate of a deceased partner or of an insolvent partner is in no case liable for the acts of the firm after his death or insolvency. This rule is well established and is hard and fast. Nothing in the way of registration of the death or insolvency of a partner, therefore, can improve the position of third parties, and no inducement need be offered, beyond the desire which will actuate most firms to keep their entry in the register up to date, for the information and benefit of intending customers. These are the exceptions where the existence of a name on the register may not establish the partnership of the person named.

As regards retired or expelled partners, who are legally on the same footing, there will be strong inducement to have the changes noted in the register. The law provides that a retired or an expelled partner continues to be liable for the acts of the firm, and the firm continues to be liable for any act of theirs purporting to be done on behalf of the firm, until public notice is given. Section 72 provides that this public notice can be given as regards retirement and expulsion only by notice to the Registrar, which will be recorded in the register, [and by publication in the local official Gazette and in one vernacular newspaper circulating in the district where the firm has its place of business.]\* Hence, when a partner retires or is expelled, it will be in his own interest and also in the interest of the remaining partners to give immediate notice of the change to the Registrar.

Similar considerations apply when a firm is dissolved. All the partners will still be liable for the acts of any of them which would have bound the firm if done before its dissolution until public notice is given. Here again, it will be in the interest of all the partners that early notice should be given, and this can be done by notice to the Registrar.

Hence it is anticipated that once a firm has been registered the Register of Firms will continue to contain a complete and up to date list of all partners who will be liable for the debts of the firm to persons who propose to deal with the firm.<sup>75</sup>

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\* Subsequently incorporated in the Section.

<sup>75</sup> Report of the Select Committee.



**70.** Any person who signs any statement, amending-statement, notice or intimation under this Chapter containing any particular which he knows to be false or does not believe to be true, or containing particulars which he knows to be incomplete or does not believe to be complete, shall be punishable with imprisonment which may extend to three months, or with fine, or with both.

Penalty for furnishing false particulars.

**71. (1)** The Governor General in Council may make rules prescribing the fees which shall accompany documents sent to the Registrar of Firms, or which shall be payable for the inspection of documents in the custody of the Registrar of Firms, or for copies from the Register of Firms :

Power to make rules.

Provided that such fees shall not exceed the maximum fees specified in Schedule I.

**(2)** The Local Government may make rules—

- (a)** prescribing the form of statement submitted under section 58, and of the verification thereof ;
- (b)** requiring statements, intimations and notices under sections 60, 61, 62 and 63 to be in prescribed form, and prescribing the form thereof ;
- (c)** prescribing the form of the Register of Firms, and the mode in which entries relating to firms are to be made therein, and the mode in which such entries are to be amended or notes made therein ;

- (d) regulating the procedure of the Registrar when disputes arise;
- (e) regulating the filing of documents received by the Registrar;
- (f) prescribing conditions for the inspection of original documents;
- (g) regulating the grant of copies;
- (h) regulating the elimination of registers and documents;
- (i) providing for the maintenance and form of an Index to the Register of Firms; and
- (j) generally, to carry out the purposes of this Chapter.

(3) All rules made under this section shall be subject to the condition of previous publication.

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## CHAPTER VIII.

### SUPPLEMENTAL.

Mode of giving public  
notice.

**72.** A public notice under this Act is given—

- (a) where it relates to the retirement or expulsion of a partner from a registered firm, or to the dissolution of a registered firm, or to the election to become or not to become a partner in a registered firm by a person attaining majority who was admitted as a minor to the benefits of partnership, by notice to the Registrar of Firms under section 63, and by publi-

cation in the local official Gazette and in at least one vernacular newspaper circulating in the district where the firm to which it relates has its place or principal place of business, and

- (b) in any other case, by publication in the local official Gazette and in at least one vernacular newspaper circulating in the district where the firm to which it relates has its place or principal place of business.

This section should be read with sections 30, 32, 33, 45 and 63.

**Public notice—old law** :—This section is a departure from the old law on the point. Under the English law<sup>76</sup> as well as under the old Indian law\* it has been held that an old customer is entitled to a more specific notice than a person who never dealt with the firm at all and an advertisement without more is of little or no value, whether it be in the "Gazette" or elsewhere, though, of course, if there be proof of actual notice that will be sufficient. Advertisement in the "Gazette" was held to be sufficient against all who had no dealings with the old firm, whether they saw it or not.<sup>77</sup>

<sup>76</sup> *Graham v. Hope*, 1 Peake 208.

\* As regards the mode of giving notice to old customers the following cases decided under sec. 264, Indian Contract Act, should be taken to have been superseded by the new enactment in sec. 72, Indian Partnership Act :—*Chundee Churn v. Eduljee*, 8 Cal. 678; *Jwaladutt v. Bansilal*, 56 I.A. 174 : 53 Bom. 414 : 1929 P.C. 132 : 115 I.C. 707 : 49 C.L.J. 485 : 33 C.W.N. 585 : 27 A.L.J. 579 : 31 Bom. L.R. 687 : 1929 M.W.N. 440 : 56 M.L.J. 739, P.C.; *Ibid*, 1927 Bom. 560 : 104 I.C. 520 : 29 Bom. L.R. 1244; *Enayatulla v. Ray & Co.*, 1927 Mad. 661 : 104 I.C. 120 : 25 M.L.W. 765; *Ezekiel v. Russa Eng. Works*, 1 Rang. 47 : 1924 Rang. 133 : 74 I.C. 16 : 2 Bur. L.J. 46; *Ghanshamdas v. Sassoon & Co.*, 1927 Sind 90 : 93 I.C. 448; *David Sassoon & Co.*, *In re*, 1927 Sind 125 : 100 I.C. 389.

<sup>77</sup> Partnership Act, Sec. 36 (a); *Godfrey v. Turnbull*, 1 Esp. 371; *Wrightson v. Pullan*, 1 Stark. 375.

**Public notice how given :—**According to this section where a firm is registered in the Register of Firms under the provisions of this Act, in case of retirement [sec. 32 (3)] or expulsion of a partner [sec. 33 (2)], dissolution (sec. 45), or the election to become or not to become a partner by a person attaining majority who was admitted as a minor to the benefits of partnership [sec. 30 (5)], public notice is given by (i) notice to the Registrar of Firms under sec. 63, and by (ii) publication in the local official Gazette and in at least one vernacular newspaper circulating in the district where the firm has its place of business. But where the firm is not registered under the provisions of this Act, the necessity of giving notice to the Registrar of Firms under sec. 63 is dispensed with.

It may be noted that Lindley suggests that registration under the Registration of Business Names Act, 1916, of a change in the firm "will not, of itself, be notice of that change either to the former customers of the firm or even to the general public ; for though an index of all the firms, and a file of all the particulars, which have to be registered are kept, and are open to public inspection, they are not published, and can only be inspected on payment of a fee."

**73.** The enactments mentioned in Schedule II  
are hereby repealed to the extent  
specified in the fourth column  
thereof.

Repeals.

**74.** Nothing in this Act or any repeal effected  
thereby shall affect or be deemed  
to affect—

Savings.

- (a) any right, title, interest, obligation or liability already acquired, accrued or incurred before the commencement of this Act, or
- (b) any legal proceeding or remedy in respect of any such right, title, interest, obligation or liability, or anything done or

suffered before the commencement of this Act, or

(c) anything done or suffered before the commencement of this Act, or

(d) any enactment relating to partnership not expressly repealed by this Act, or

(e) any rule of insolvency relating to partnership, or

(f) any rule of law not inconsistent with this Act.

### SCHEDULE I

#### MAXIMUM FEES.

[See sub-section (1) of section 71.]

Document or act in respect of which the fee is payable.	Maximum fee.
Statement under section 58 . . . .	Three rupees.
Statement under section 60 . . . .	One rupee.
Intimation under section 61 . . . .	One rupee.
Intimation under section 62 . . . .	One rupee.
Notice under section 63 . . . .	One rupee.
Application under section 64 . . . .	One rupee.
Inspection of the Register of Firms under sub-section (1) of section 66.	Eight annas for inspecting one volume of the Register.
Inspection of documents relating to a firm under sub-section (2) of section 66.	Eight annas for the inspection of all documents relating to one firm.
Copies from the Register of Firms . . . .	Four annas for each hundred words or part thereof.

SCHEDULE II.  
ENACTMENTS REPEALED.  
(See section 73.)

Year. 1	No. 2	Short title. 3	Extent of Repeal. 4
1872	IX	The Indian Contract Act, 1872.	Exceptions 2 & 3 to section 27. The whole of Chapter XI.
1920	Burma Act VIII.	The Burma Registration of Business Names Act, 1920.	The whole.

## APPENDIX I.

### THE CODE OF CIVIL PROCEDURE.

*Act V of 1908.*

#### ORDER XXX.

*Suits by or against Firms and Persons carrying on business in names other than their own.*

1. (1) Any two or more persons claiming or being liable as partners and carrying on business in British India may sue or be sued in the name of the firm (if any) of which such persons were partners at the time of the accruing of the cause of action, and any party to a suit may in such case apply to the Court for a statement of the names and addresses of the persons who were, at the time of the accruing of the cause of action, partners in such firm, to be furnished and verified in such manner as the Court may direct.

(2) Where persons sue or are sued as partners in the name of their firm under sub-rule (1), it shall, in the case of any pleading or other document required by or under this Code to be signed, verified or certified by the plaintiff or the defendant, suffice if such pleading or other document is signed, verified or certified by any one of such persons.

**Firms as plaintiffs or defendants :—**Order XXX deals with suits by or against firms and persons carrying on business in names other than their own. It is settled law that the effect of the provisions with regard to suing partners in their firm name is merely to give a compendious mode of describing in the writ the partners who compose the firm and that the plaintiff who sues partners in the name of their firm in truth sues them individually just as much as if he had set out all their names.<sup>1</sup> The firm name is a mere expression, not a legal entity, and for convenience it may be used for the sake of suing and being sued. The same considerations apply where the firm is sued under rule 10.<sup>2</sup> The suit is in effect a suit against the individual partners of the firm sued.<sup>3</sup>

<sup>1</sup> *Western National Bank v. Perez, Triana & Co.*, (1891) 1 Q.B.D. 304; *Heinemann & Co. v. S. B. Hale & Co.*, (1891) 2 Q.B. 83.

<sup>2</sup> *Ram Prasad v. Anundji & Co.*, 49 Cal. 524.

<sup>3</sup> *Firm of Gokaldas v. Firm of Vassumal*, 1925 Sind 298 : 87 I.C. 992; *Lakmichand v. Gokaldas*, 1925 Sind 75 : 90 I.C. 242.

*Effect of decree*:—Several consequences follow from this. A decree against the firm has the same effect as a decree against all the partners. Where a suit is filed against a firm and some partners are served individually the mere fact that any individual partner was not served would not at all affect the maintainability of the suit.<sup>4</sup>

*Effect of non-appearance by some partners*:—So it can never be said that a decree against the firm is *ex parte* against one of the partners, because he has not appeared. The appearance of any partner is appearance of the firm. A partner undoubtedly can enter appearance in his own name and file a written statement, and each partner can file a different written statement taking up different defences, but the proceedings continue against the firm.<sup>5</sup>

*Death of one or more partners*:—A suit against a firm is maintainable even if one of the partners of the firm is dead on the date of the institution of the suit,<sup>6</sup> though when one partner is dead to the knowledge of the plaintiff, the legal representatives must be joined as defendants to make the private property of the deceased liable and mere service of summons is not sufficient to issue execution against them.<sup>7</sup> If a partner dies before the suit and the suit is against the firm in the firm's name, the suit is solely against the surviving partners, and judgment can only be obtained against the surviving partners and be enforced against them and against the partnership assets.<sup>8</sup> A dead man cannot be assumed to be a party to the action as a dead man cannot be sued.<sup>9</sup>

*Suing partners individually*:—This Order does no doubt allow the plaintiff to sue the members of a firm not in their individual capacity but as a firm, but it does not in the slightest degree affect the right of the plaintiff to bring on the record the different members of the firm. The Code of 1908 merely provides a new procedure. It does not affect the law on the subject which is to the effect that a plaintiff bringing a suit against a firm may implead all the members of the firm as defendants in that suit.<sup>10</sup> There are certain advantages in bringing on record at least all the solvent members of a firm. In suits where a partner is allowed to represent others, any decree passed can bind the others only with respect to the

<sup>4</sup> *Lakmichand v. Gokuldas*, 1925 Sind 75 : 90 I.C. 242.

<sup>5</sup> *Adiveppa Shidlingappa v. Paragji Mohanji*, 1924 Bom. 366 : 80 I.C. 773 : 26 Bom. L.R. 388.

<sup>6</sup> *Firm of Baldeo Prasad v. Firm of Haji Ali Mahomed*, 27 A.L.J. 73 : 112 I.C. 715.

<sup>7</sup> *Mathuradas v. Ebrahim*, 51 Bom. 986 : 1927 Bom. 581 : 105 I.C. 305 : 29 Bom. L.R. 1296.

<sup>8</sup> *Rampratab v. Gaurishankar*, 1924 Bom. 109 : 85 I.C. 464 : 25 Bom. L.R. 7.

<sup>9</sup> *Firm of Gokuldas v. Firm of Vassumal*, 1925 Sind 298 : 87 I.C. 992.

<sup>10</sup> *Bibi Kazmi v. Lachmal Lal*, 9 Pat. 717 : 1930 Pat. 239.



property of those others which he can in law represent and no personal decree can be passed against them, although the party on record may be personally liable.<sup>11</sup> But where all the partners are added as defendants and individually served as partners with summons, the decree-holder may proceed against them personally without obtaining leave of the Court under Or. 21, r. 50 (2).

**Set-off of decree:**—As a firm is identical with the individuals constituting it, a decree in favour of partners individually can be set off against a decree against the firm composed of some of the individuals.<sup>12</sup>

**Two or more partners:**—When a suit under this rule is brought in the name of a firm there must be two or more persons carrying on the business in that name. The rule excludes the case of one single person carrying on the business in the name of the firm.<sup>13</sup> Hence a firm consisting of a sole proprietor cannot bring a suit in the name of the firm but must sue in the name of the proprietor,<sup>14</sup> though he may be sued in the firm name under rule 10.

**Right of a partner to sue:**—One partner cannot sue alone on behalf of a firm,<sup>15</sup> and sec. 45, Indian Contract Act relates to partners as well.<sup>16</sup> That section has not been modified by the Code of Civil Procedure save as appears in Or. 30 which is confined to cases where suits are brought not by individuals, but in the name of the firms under which they are trading.<sup>17</sup> So where one of two partners in business refuses to join as plaintiff, the correct procedure is to make him a defendant in the suit.<sup>18</sup>

But there is no absolute rule of law that one partner of a firm cannot sue for a debt that is due to the firm. A partner with whom a contract has been personally made is entitled to sue upon that contract in his own name without joining the co-partners as plaintiffs, although the benefit of the contract would result to the partnership firm. That is really an illustration of the rule that an agent having an interest in the contract which he has entered into on behalf of his principal is entitled

11 *Thambi Marakayar v. Hamid Marakayar*, 36 Mad. 414.

12 *A. G. of Bombay v. Haji Sultanallu*, 1927 Bom. 255 : 104 I.C. 319 : 29 Bom. L.R. 396.

13 *Swarath Ram v. Sarup Lal*, 12 A.L.J. 1020 : 251 I.C. 131.

14 *Samarthrai v. Kasturbhai*, 32 Bom. L.R. 212 : 1930 Bom. 216.

15 *Subraya v. Ram Vhandra*, 7 M.L.T. 432 : 6 I.C. 438; *Sheolal v. Sagar Mal*, 40 I.C. 108 : (1917) Pat. 247 : 1 Pat. L.W. 51.

16 *Motilal v. Ghellabhai*, 17 Bom. 6; *Aga Ghulam v. Sasoon*, 21 Bom. 412, 421; *Dost Mahomed v. Mohandas*, 91 I.C. 573.

17 *Hari Singh v. Firm Karam Chand*, 8 Lah. 1 : 1927 L. 115 : 100 I.C. 721 : 28 P.L.R. 455.

18 *Bullmal v. Jhabba*, 1925 Lah. 504 : 92 I.C. 569 : 26 P.L.R. 699 : 7 L.L.J. 280.

to sue in his own name.<sup>19</sup> A suit by a firm on a pro. note in favour of one of the partners is thus maintainable.<sup>20</sup>

**Carrying on business in British India :—**In order to take advantage of this rule, two or more persons must carry on business in British India. If they do not, the special provisions will not apply. Where a partner of a firm carrying on business outside British India instituted a suit in British India in the firm's name but the Court decided that the suit as framed was not maintainable and the plaintiff amended the plaint by striking out his name and inserted the names of the individual partners, *held* that the suit was brought by an entity which had no legal existence and therefore the amendment could not be treated as an amendment following upon a mere description but must be treated as an application for the substitution as plaintiffs of the individual persons who compose the entity which the law did not recognise.<sup>21</sup>

**Partners at the time of accruing of cause of action :—**Under this rule persons carrying on business in the name of a firm may be sued under such name if they were carrying on business under such name on the date of the accruing of the cause of action and not necessarily at the time of the suit.<sup>22</sup> Hence even though the firm may have been dissolved before the date of the suit, provided the cause of action arose before the date of dissolution, a suit may be brought by or against a firm in the firm-name.<sup>23</sup>

**Disclosure of partners' names :—**Under this rule a person is entitled to know who the persons are who constitute that firm and the information cannot be withheld.<sup>24</sup> This rule regarding the disclosure of partners' names applies to the case of the plaintiffs and defendants alike, whereas the disclosure of partners' names under rule 2 (1) refers to the case of plaintiffs only.<sup>24a</sup>

Where a suit is instituted by one of the partners on behalf of the firm as its agent the suit cannot be dismissed on account of the non-joinder of the other partners. All that the defendant

<sup>19</sup> *Kapurji Manigram v. Pannaji*, 53 Bom. 110 : 1929 Bom. 177 : 113 I.C. 341 : 30 Bom. L.R. 1560; *Mehr Singh v. Chela Ram*, 1906 P.R. 127; *Imamuddin v. Ltladhar*, 14 All. 524.

<sup>20</sup> *Brojo Lal v. Budh Nath*, 55 Cal. 551 : 1928 Cal. 148 : 105 I.C. 549.

<sup>21</sup> *Vyankatesh Oil Mill Co. v. Velmahomed*, 1928 Bom. 191 : 109 I.C. 99 : 30 Bom. L.R. 117.

<sup>22</sup> *Firm of Baldeo Prasad v. Firm of Haji Ali Mahomed*, 27 A.L.J. 73 : 112 I.C. 715.

<sup>23</sup> *Pulln Behari v. Mahendra Chandra*, 34 C.L.J. 405 : 67 I.C. 10 : 1921 Cal. 722.

<sup>24</sup> *Bridges & Co. v. Shames Din*, 47 I.C. 422 : 78 P.R. 1918 : 155 P.W.R. 1918 : 105 P.L.R. 1918.

<sup>24a</sup> *Natvarlal v. Sassoon & Co.*, 51 Bom. 794 : 1927 Bom. 447 : 102 I.C. 256.

is entitled to is the disclosure of the names of those partners. If the other partners are added as plaintiffs even after the period of limitation the suit cannot be held to be barred by section 22 of the Limitation Act.<sup>25</sup> So when a suit as originally laid is against the firm, the description of the proper representative of that firm can always be corrected and such correction does not amount to either substitution or addition of a new party to the suit. No question of limitation under section 22 of the Limitation Act arises in such a case.<sup>26</sup>

**Form of heading :—**When a suit is brought by or against a firm, the proper title of the party is: "AB, a firm carrying on business in partnership at," (See Appendix A to the C. P. Code, (2) "Description of the parties in particular cases".) Rule 3 provides for the manner of service of summons where persons are sued as partners in the name of their firm and rule 6 provides for the manner of appearance of such persons. An individual partner may be sued personally along with the firm.<sup>27</sup> But it is not correct to sue persons as partners in the name of the firm by a partner or manager and the proper title of the defendants is: "Defendant 1: X Y Z, a firm. Defendant 2: A B. C., a partner in the firm. Defendant 2: D. E. F., a partner in the firm."<sup>28</sup> In a suit against the firm of "Manmal Chandmal" the defendant was described as "Chandmal Hindumal as owner and manager of the shop Manmal Chandmal" but Chandmal having died before the suit his heirs were brought on the record after the period of limitation. *Held* that though not in form, but in substance the plaintiff sued the firm of "Manmal Chandmal". If he had simply described the defendant as "the firm of Manmal Chandmal" without mentioning the names of the owners or partners of the firm, the description would have been sufficient. The further description of the defendant Chandmal Hindumal as "the manager and owner of the firm" may be treated as a mere surplusage, and therefore the suit was not barred.<sup>29</sup>

2. (1) Where a suit is instituted by partners in the name of their firm, the plaintiffs or their pleader shall, on demand in writing by or on behalf of any defendant, forthwith declare in writing the names and places of residence of all the persons constituting the firm on whose behalf the suit is instituted.

<sup>25</sup> *Marayya v. Sami*, 2 L.W. 239: 28 I.C. 210.

<sup>26</sup> *Seo Lal v. Tularam*, 1928 Nag. 319: 109 I.C. 785.

<sup>27</sup> *Taylor v. Collier & Co.*, 30 W.R. 71 (Eng.).

<sup>28</sup> *Ajitsing Manibhai v. Grunning & Co.*, 1925 Bom. 494: 94 I.C. 969: 27 Bom. L.R. 998.

<sup>29</sup> *Motilal v. Chandmal Hindumal*, 1924 Bom. 155: 77 I.C. 1055: 25 Bom. L.R. 1081.

(2) Where the plaintiffs or their pleader fail to comply with any demand made under sub-rule (1), all proceedings in the suit may, upon an application for that purpose, be stayed, upon such terms as the Court may direct.

(3) Where the names of the partners are declared in the manner referred to in sub-rule (1), the suit shall proceed in the same manner, and the same consequences in all respects shall follow, as if they had been named as plaintiffs in the plaint :

Provided that all the proceedings shall nevertheless continue in the name of the firm.

**Disclosure of names by plaintiff firm :—**This rule deals with the case of plaintiffs.<sup>30</sup> In a suit by a plaintiff firm in the name of the firm, the defendant, if he so demands, is entitled to the declaration of the names and places of residence of the partners of the plaintiff firm. A wrong or partial declaration is not in itself fatal to the suit, and a redeclaration disclosing the names not formerly given can be allowed.<sup>31</sup> The disclosure of the name of partners under this rule does not alter the form of the suit and the suit continues as before in the name of the firm (rule 6).

On a failure of the plaintiff firm to comply with the demand of the defendant, all proceedings in the suit may be stayed upon the application for that purpose upon such terms as the Court may direct. But if the names of the partners have been already given under rule 2 (1) the suit shall proceed in the same manner and the same consequences shall follow as if they have been named as plaintiffs in the plaint. The defendant must accept the plaintiff's declaration of names and preliminary issue to ascertain who the partners are is not contemplated.<sup>31a</sup>

The words of sub-rule (3) refer to proceedings in the suit and they have no application to anything that follows after the suit has reached the stage of a decree and has thus been completed. Or. 21, R. 50 is not thus controlled by this sub-rule, and therefore in spite of declaration of the names of partners, the provisions of rule 50 (2) must be followed if the defendant wants to execute his decree allowing counter-claim personally against the partner whose name was disclosed at his instance under sub-rule (1).<sup>30</sup>

- 3. Where persons are sued as partners in the name of their firm the summons shall be served either—**

Service.

(a) upon any one or more of the partners, or

<sup>30</sup> *Natvarlal v. Sassoon & Co.*, 51 Bom. 794 : 1927 Bom. 447 : 103 I.C. 256.

<sup>31</sup> *Imperial Pressing Co. v. Br. Crown Ass. Corporation*, 41 Cal. 581; *Babasa v. Baboosa*, 1930 Bom. 150 : 32 Bom. L.R. 56.

<sup>31a</sup> *Abrahams & Co. v. Dunlop Pneumatic Tyre Co.*, (1905) 1 K.B. 46.

(b) at the principal place at which the partnership business is carried on within British India upon any person having, at the time of service, the control or management of the partnership business there,

as the Court may direct; and such service shall be deemed good service upon the firm so sued, whether all or any of the partners are within or without British India:

Provided that, in the case of a partnership which has been dissolved to the knowledge of the plaintiff before the institution of the suit, the summons shall be served upon every person within British India whom it is sought to make liable.

**Service of summons:**—In a suit against partners in the name of their firm, the service of summons may, with the directions of the Court, be effected in either of the two ways—it may be (1) served upon any or more of the partners or (2) served at the principal place of the business upon the person who, has, at the time of service, control or management of the business. Such service is good upon the firm and the decree passed in the suit will be executed against the property of the firm or business. If the summons is not served in either of these ways, it has been held upon the corresponding English rule that the service is irregular.<sup>32</sup> Further if the partnership business no longer exists and the firm has been dissolved, the only method under this rule which is open is to serve upon a partner, i.e., upon one of the individuals charged as liable as principals.<sup>33</sup>

This rule is to be read with O. 21, R. 50 of C. P. Code. Although service of summons in either of the ways mentioned above is good upon the firm, different consequences will follow at the time of execution by virtue of O. 21, R. 50. Execution may be granted, under O. 21, R. 50, sub-rule 1 Cl. (c) against (1) any property of the partnership and against (2) any personal property of the partner who has been individually served with notice. Consequently if the manager of the partnership business is not a partner of the same, a decree passed against the firm when the summons has been served upon the manager, will not entitle the decree-holder to proceed against the personal property of any of the partners besides those of the partnership business. The decree-holder can proceed against persons not individually served only under O. 21, R. 50, sub-rule (2).<sup>34</sup>

<sup>32</sup> *Worcester City and County Banking Co. v. Firbank, Pauling & Co.*, (1894) 1 Q.B. 784.

<sup>33</sup> *Harjibandas v. Bhagwandas*, 49 Cal. 394: 1922 Cal. 390.

<sup>34</sup> *Bainsab v. Bank of Bengal*, 19 C.W.N. 1008 at p. 1012: 19 C.L.J. 581: 26 I.C. 866.

Execution cannot, therefore, be granted as a matter of course against the personal property of any partner who is not served with summons and did not appear, and leave of the Court must be obtained under Or. 21, R. 50 (2) to proceed against the personal property of the partner where summons was served in the second way (see *infra* Or. 21, R. 50).<sup>34</sup>

Under this rule the directions of the Court must be obtained as to the method of service to be followed.<sup>35</sup> Sir D F. Mulla is, however, of opinion that omission to obtain such directions would not vitiate the service but would constitute at most an "irregularity" within the meaning of section 99.<sup>36</sup> According to the English rule, the direction of the Court is not necessary and the plaintiff may, at his option, serve the writ in either of the two ways. If notice is sent by registered post in the manner provided by rule 11 chapter VIII of the High Court rules, it is necessary that the letter should be addressed to some particular person alleged to be a partner so as to comply with rule 3.<sup>37</sup>

Service effected by affixing summons at the managing partner's residence has been held to be improper.<sup>38</sup> But it is to be submitted that service of summons at the managing partner's residence is good, if the summons states that it is served on him in the capacity of a partner. This rule does not apply where suit is brought against persons in their individual capacities<sup>39</sup> or against the partner as well as the firm.<sup>40</sup>

**Proviso : suits after dissolution :—**The proviso to rule 3 contemplates cases where the firm has been dissolved to the knowledge of the plaintiff before the institution of the suit. In such cases partners who are sought to be made personally liable must be individually served with notice. This proviso overrides Or. 21, R. 50 which only applies where there has been no dissolution to the knowledge of the plaintiff.<sup>40a</sup> In the case of a firm which has been dissolved to the knowledge of the plaintiff before the institution of the suit, the plaintiff must serve each and every person whom he wants to hold liable personally. If he does not so serve he cannot execute the decree against the partner whom he has not served personally.

<sup>34</sup> *Baisnab v. Bank of Bengal*, 19 C.W.N. 1008 : 19 C.L.J. 581.

<sup>35</sup> *I. C. C. Compagnie v. Mehta & Co.*, 54 Cal. 1057 : 31 C.W.N. 1004 : 105 I.C. 356 : 1927 Cal. 758.

<sup>36</sup> *Mulla's C.P.C.* (7th edition) p. 714.

<sup>37</sup> *Harjibandas v. Bhagwandas*, 49 Cal. 394 : 69 I.C. 236 : 1922 Cal. 390.

<sup>38</sup> *Manjimal v. Khubchand*, 1926 Sind 208 : 95 I.C. 149.

<sup>39</sup> *Mahabir v. Balkishun*, 1 Pat. 48 : 62 I.C. 927 : 1922 Pat. 376 : 3 P.L.T. 29.

<sup>40</sup> *Ajit v. Mritunjoy*, 88 I.C. 489 : 1925 Cal. 1136.

<sup>40a</sup> *Mathuradas v. Ebrahim*, 51 Bom. 986 : 1927 Bom. 581 : 105 I.C. 305.

But the right to execute the decree against the firm is in no way affected by the proviso.<sup>41</sup> In case of death of a partner to the knowledge of the plaintiff before the action, his legal representatives must be joined as defendants to make the private property of the deceased liable apart from the deceased partner's interests in the partnership assets, and mere service of summons on them is not sufficient to issue execution against them under Or. 21, R. 50 (2).<sup>42</sup>

The word "person" in the proviso cannot mean any person but must mean any person sought to be made liable as a partner.<sup>42</sup>

4. (1) Notwithstanding anything contained in section 45 of the Indian Contract Act, 1872, where two or more persons may sue or be sued in the name of a firm under the foregoing provisions and any of such persons dies, whether before the institution or during the pendency of any suit, it shall not be necessary to join the legal representative of the deceased as a party to the suit.

(2) Nothing in sub-rule (1) shall limit or otherwise affect any right which the legal representative of the deceased may have—

- (a) to apply to be made a party to the suit, or
- (b) to enforce any claim against the survivor or survivors.

**Legal representatives not necessary parties:**—If any of the partners dies before the institution or during the pendency of a suit in the name of a firm either as a plaintiff or as a defendant, it shall not be necessary to join the legal representatives of the deceased as a party to the suit. And thus suits to recover debts due to trading partnership stand on a different footing from suits to recover debts due under ordinary contracts.<sup>42a</sup>

Although sec. 45 of the Indian Contract Act applies in terms to all cases of joint contracts, prior to the enactment of this rule, Allahabad, Bombay and Madras High Courts held that representatives of a deceased partner were not necessary parties to a suit for recovery of a debt which accrued due to the partnership in the lifetime of the deceased.<sup>43</sup> On the other hand, contrary view was maintained by the Calcutta High

<sup>41</sup> *Gordhandas v. Gautamchand*, 87 I.C. 1051: 1925 Bom. 33: 27 Bom. L.R. 541.

<sup>42</sup> *Mathuradas v. Ebrahim*, 51 Bom. 986: 105 I.C. 305: 29 Bom. L.R. 1295: 1927 Bom. 581.

<sup>42a</sup> *Moolchand v. Mulchand*, 4 Lah. 142: 71 I.C. 951: 1923 Lah. 197.

<sup>43</sup> *Govind v. Chandar*, 9 All. 486; *Valdayanatha v. Chinnasami*, 17 Mad. 108; *Debi Das v. Nirpat*, 20 All. 365; *Ugar Sen v. Lakhmi*, 32 All. 638; *Motilal v. Ghellabhai*, 17 Bom. 6.

Court.<sup>44</sup> This rule was enacted to set at rest the doubt that existed in connection with section 45, Contract Act, in regard to suits by or against firm.<sup>50a</sup> That section has not been modified by the C. P. Code save as appears in Or. 30 which is confined to cases where suits are brought not by individuals but in the name of the firm under which they are trading.<sup>45</sup>

This rule applies to suits which not only may be, but are, as a matter of fact, instituted in the name of the firm and does not apply to suits instituted in the name of individual partners.<sup>46</sup> Where, therefore, a suit is instituted by several persons as proprietors of a firm and after an appeal from the decree had been filed one of them died but his legal representatives were not substituted, the appeal failed for defect of parties.<sup>47</sup>

The legal representative of a deceased partner not being a necessary party to a suit by or against a firm, there can be no abatement on the death of a partner.<sup>48</sup> But a firm owned by a sole proprietor ceases to exist on the death of such proprietor and it is necessary to bring on the record the legal representatives<sup>49</sup> (see under rule 10).

If the legal representatives of a deceased partner are not impleaded in a suit against a firm, the personal estate of the deceased partner cannot be rendered liable, the decree being capable of execution against the assets of the partnership.<sup>50</sup> Mere service of summons on them is not sufficient for obtaining leave to issue execution against them under Or. 21, R. 50 (2), when they are not added as parties to the suit.<sup>50a</sup> Hence execution cannot be issued against the legal representatives of deceased partners in respect of assets in their possession belonging to the deceased if he had been dead to the knowledge of the plaintiff but was not known to be partner of the same till some time after the institution of the suit.<sup>51</sup> O. 30, R. 4 (2) does not affect the right of any legal representative to apply to be made a party to the suit or to enforce any claim against the survivors.

44 *Ram Narain v. Ram Chunder*, 18 Cal. 86.

45 *Harl Singh v. Karam Chand*, 8 Lah. 1 : 100 I.C. 721 : 1927 Lah. 115 : 28 P.L.R. 455.

46 *Haji Dost Mahomed v. Mohandas*, 91 I.C. 573 : 1926 Sind 81 : 20 S.L.R. 238.

47 *Monmohan v. Bldhu Bhusan*, 28 C.L.J. 268 : 48 I.C. 309.

48 *Utankalal v. Taraknath*, 48 C.L.J. 357 : 114 I.C. 156 : 1929 Cal.

11; *Moolchand v. Mulchand*, 4 Lah. 142 : 71 I.C. 951 : 1923 Lah. 197.

49 *Prabhdial v. Ganpat*, 103 I.C. 142 : 1927 Lah. 556; *Daulatram v. Ishar Das*, 1929 Lah. 149 : 111 I.C. 706.

50 *Ramnarain v. Ramprasad*, 1930 A.L.J. 913.

50a *Mathuradas v. Ebrahim*, 51 Bom. 986 : 105 I.C. 305 : 1927 Bom. 581.

51 *T. Mahomed v. Sadullah*, 52 Mad. 885, F.B. : 119 I.C. 603 : 1929 Mad. 733 : 30 M.L.W. 219 : 57 M.L.J. 344 : 1930 M.W.N. 6.



Application under O. 30, R. 4 (2) (a) is governed by Art. 176.<sup>52</sup>

**5. Where a summons is issued to a firm and is served in the manner provided by rule 3, every person upon whom it is served shall be informed by notice in writing given at the time of such service, whether he is served as a partner or as a person having the control or management of the partnership business, or in both characters, and, in default of such notice, the person served shall be deemed to be served as a partner.**

Notice in what capacity served.

**Summons without notice as to the capacity :—**Summons served in the manner provided by rule 3, must inform in writing the party so served, at the time of service as to whether he is a partner, or a person in the control or management of the business, or both as a partner and manager. If no notice to this effect is given, the person shall be deemed to be served as a partner. Summons served without notice as to the capacity on a person who is only in the control or management of the business will be ineffective because such persons under this rule shall be deemed to be a partner which he is not. Failure of notice makes plaintiff liable for costs if defendant appears under protest under rule 8, but rule 5 operates when defendant appears unconditionally.<sup>53</sup>

**6. Where persons are sued as partners in the name of their firm, they shall appear individually in their own names, but all subsequent proceedings shall, nevertheless, continue in the name of the firm.**

Appearance of partners.

**Appearance of partners :—**Persons sued as partners in the name of their firm shall appear individually in their own names, but all the proceedings, nevertheless, shall continue in the name of the firm.

A firm not being a juristic person, cannot appear as a firm.<sup>54</sup> Appearance of any of the partners sued in the firm name is appearance of the firm.<sup>55</sup> It is clear therefore that when more than one partner sued in the firm name appear individually in their own names, they may file separate written statements and each of such written statements is the written statement of the firm.<sup>56</sup> If any partner considers that his rights will not be adequately represented by the other partner who

<sup>52</sup> *Pulin v. Mahendra*, 34 C.L.J. 405 : 67 I.C. 10 : 1921 Cal. 722.

<sup>53</sup> *Fateh Chand v. Utanmal*, 89 I.C. 401 : 1926 Sind 51.

<sup>54</sup> *Daulatram v. Ishar Das*, 111 I.C. 706 : 1929 Lah. 149.

<sup>55</sup> *Lysaght v. Clark & Co.*, (1891) 2 Q.B. 552.

<sup>56</sup> *Ajit Singh v. Grunning & Co.*, 94 I.C. 969 : 1925 Bom. 494 : 27 Bom. L.R. 998.

has been impleaded, or that his interest is adverse to that of the other partner, it is just and fair that he should be allowed to appear individually and resist the claim.<sup>57</sup> When separate defences are taken by partners individually in the name of their firm, the plaintiff will be obliged to show that no one of the defences prevents a decree being made against the firm.<sup>58</sup>

Where a firm is sued as such a partner cannot put in a defence in his own name as distinguished from that in the name of the firm.<sup>59</sup> It is only when a person is sued personally along with the firm that he may put in a personal defence.<sup>60</sup> Where a partner served with summons as a partner and not in his individual capacity, appeared and filed a written statement in his own name and not as a representative of the firm, although there was nothing individual in the defence it was held that this was only a technical flaw which could be corrected even at the argument stage.<sup>61</sup>

**7. Where a summons is served in the manner provided by rule 3 upon a person having the control or management of the partnership business, no appearance by him shall be necessary unless he is a partner of the firm sued.**

**No appearance except by partners :—**When a summons in a suit instituted against a firm is served upon the manager who is not a partner of the firm in the manner provided by rule 3, there is no obligation on him to appear in Court.<sup>62</sup>

A firm is not a person and the C. P. Code prescribes a form of suit which remains really one against the partners of the firm. Where in a suit against a firm through an alleged partner it is held that the sole defendant on record is not a partner of the firm, and the procedure in rule 8 is not observed, no decree can be passed against the firm, and if a decree is passed it would be null and void.<sup>63</sup>

**8. Any person served with summons as a partner under rule 3 may appear under protest, denying that he is a partner, but such appearance shall not preclude the plaintiff from otherwise serving a summons on the firm and obtaining a decree against the firm in default of appearance where no partner has appeared.**

<sup>57</sup> *Sital Prosad v. Peary Lal*, 1930 All. 701 : 1930 A.L.J. 1212.

<sup>58</sup> *I. C. C. Compagnie v. Mehta & Co.*, 54 Cal. 1057 : 105 I.C. 356 : 31 C.W.N. 1004 : 1927 Cal. 758.

<sup>59</sup> *Ellis v. Wadeson*, (1899) 1 Q.B. 714.

<sup>60</sup> *Ajit Sing v. Grunning & Co.*, 94 I.C. 969 : 1925 Bom. 494 : 27 Bom. L.R. 998.

<sup>61</sup> *Pokhardas v. Girdharilal*, 1929 Sind 192.

<sup>62</sup> *Fateh Chand v. Utanmal*, 89 I.C. 401 : 1926 Sind 51.

<sup>63</sup> *Daulatram v. Ishardas*, 111 I.C. 706 : 1929 Lah. 149.

**Appearance under protest :—**If a person who has been served with summons as a partner under rule 3 appears under protest with a denial of partnership, the service on him as service on the firm is a nullity, and the plaintiff should again serve summons upon the firm in accordance with rule 3.<sup>64</sup> An adjournment to have a duplicate writ of summons served on the defendant firm should be granted.<sup>65</sup>

But if the service has already been otherwise effected, as for instance, by service upon some other person as a partner who has not entered appearance under protest or by service upon the manager of the firm, no further steps should be taken towards effecting service.<sup>64</sup>

It has been held by the Calcutta High Court that a person served as a partner entering appearance under protest is precluded from filing a written statement on his own behalf denying that he is a partner.<sup>64</sup> The defendant is entitled to have that point decided only after judgment in execution if the plaintiff wants to proceed against him under Or. 21, R. 50.<sup>66</sup> On the contrary, it has been held that a defendant is not precluded from taking alternative defence, *viz.*, in the form that he is not a partner in the firm sued and alternatively assuming that he is a partner, the firm itself is not liable.<sup>66</sup> In the Bombay High Court it was held that where a person enters appearance under protest as aforesaid, he may apply to have the question decided whether or not he is a partner in the defendant's firm.<sup>66</sup> Appearance under protest has nothing to do with the merits of the case. Its effect is merely to nullify the service altogether as regards the defendant firm. If the plaintiff again serves summons in accordance with the provisions of rule 3 and obtains judgment against the firm he may apply under Or. 21, rule 50 for leave to issue execution against the person who had appeared under protest, when, if the liability is still disputed, the Court may order the liability of such person to be tried and determined. Or the plaintiff may wish to challenge at once the denial of the person served as a partner that he was a partner. If so, he should take out a summons to strike out the appearance entered on the ground that the party appearing is a partner in the firm sued or was a partner at the time the cause of action accrued, or in the alternative, to strike out of such appearance the denial of a partnership. An order may then be made directing an issue to be tried to determine the question of partnership.<sup>67</sup> It may be noted that

<sup>64</sup> *I. C. C. Compagnie v. Mehta & Co.*, 54 Cal. 1057 : 105 I.C. 356 : 31 C.W.N. 1004 : 1927 Cal. 758.

<sup>65</sup> *Vithaldas v. Hansraj*, 64 I.C. 688 : 1921 Bom. 48 : 23 Bom. L.R. 1249.

<sup>66</sup> *Chotumal v. Allubhoy*, 93 I.C. 380 : 1926 Sind 154.

<sup>67</sup> *Ramanujachary v. Pohoomal*, 50 Bom. 665 : 99 I.C. 495 : 1926 Bom. 585 : 28 Bom. L.R. 1275.

in the Calcutta case the point did not specifically arise and the view expressed by the Court was left open for re-consideration.

On reading Rules 6, 7, and 8 together, the result appears to be that in a suit against partners in the firm name, the only persons entitled to appear are :

- (1) alleged partners at the time when the cause of action accrued.
- (2) persons who are served as partners but deny that they were partners at the time of cause of action.

The manager of a firm though may be legally served with notice is not under any obligation to appear.<sup>67a</sup>

**9. This Order shall apply to suits between a firm and one or more of its partners or between two firms with one or more common members may be instituted under Order 30, but no execution can be issued except by leave of the Court.**

**Suits between co-partners.** or more of the partners therein and to suits between firms having one or more partners in common ; but no execution shall be issued in such suits except by leave of the Court, and, on an application for leave to issue such execution, all such accounts and inquiries may be directed to be taken and made and directions given as may be just.

**Suits between co-partners :**—Suits between a firm and one or more of its partners or between two firms with one or more common members may be instituted under Order 30, but no execution can be issued except by leave of the Court.

But there appears to be no reason why, if two firms have common partners, an action should not be maintained by one firm against the other not perhaps in their mercantile names, but by those members of one firm who are not common to both, against the members of the other firm.<sup>68</sup> Where a common partner to two firms sued individually another partner of one of those two firms for recovery of certain amounts as due to him for money advanced by one firm to the other, it was held that the plaintiff was practically suing himself and that the suit was not maintainable as he had not asked for accounts.<sup>69</sup> Where all the members of one firm are also members of another firm, a suit for account or for the balance found due cannot be brought as the proper remedy lies in a partnership account of the second firm.<sup>70</sup>

One of the directors excluded from acting as director may bring an action for tort against the other directors personally.<sup>71</sup>

<sup>67a</sup> *Fateh Chand v. Utanmal*, 89 I.C. 401 : 1926 Sind 51.

<sup>68</sup> *Nagendrier v. Bhagavathar*, 101 I.C. 93 : 1927 Mad. 1096 : 52 M.L.J. 303, citing *Lindley*; *Kashinath v. Ganesh*, 26 Bom. 739 : *Rustomji v. Purushothama*, 25 Bom. 606.

<sup>69</sup> *Lakshmana v. Nagappa*, 34 M.L.J. 408 : 45 I.C. 86.

<sup>70</sup> *Pokhardas v. Giridharilal*, 1929 Sind 192.

<sup>71</sup> *Subramania v. U. I. L. Insurance*, 114 I.C. 636 : 1928 Mad. 1215 : 53 M.L.J. 385.

**10. Any person carrying on business in a name or style**

**Suit against person** other than his own name may be sued carrying on business in in such name or style as if it were a name other than his own. firm name ; and, so far as the nature of the case will permit, all rules under this Order shall apply.

**Suit against a sole proprietor of a business with a trading name** :—When a single person carries on business with an assumed trading name, all the rules under Order 30 will apply as far as permissible.

In such a case the firm's name is only another name of the proprietor and any person can sue him either in his own name or the other name<sup>72</sup> the suit being essentially against the proprietor.<sup>73</sup> This rule applies only when the business is being actually carried on in that name. So, if the sole proprietor dies before a suit is instituted, the business ceases to exist and rule 10 becomes inapplicable, and all persons who are interested in the assets ought to be impleaded.<sup>74</sup> If a suit is brought against him in the name in which he carried on business, the suit is against a dead man and it is a nullity from its inception.<sup>75</sup> If, however, after the death of the proprietor, the business is carried on in the old firm name, the presumption is that the heirs are the partners of the firm of that name and a suit may be instituted under this rule.<sup>76</sup>

If the sole proprietor die during the pendency of the suit instituted against his firm, it is necessary to bring on the record his legal representatives. Otherwise a decree against a dead man becomes an absolute nullity.<sup>76</sup>

<sup>72</sup> *Haribandhu v. Harimohan*, 57 Cal. 931 : 51 C.L.J. 30 : 34 C.W.N. 36 : 1930 Cal. 327.

<sup>73</sup> *Brijmohan v. Kastam*, 1924 Bom. 109.

<sup>74</sup> *Habib Bux v. Samuel Fitz. & Co.*, 89 I.C. 22 : 1926 All. 161 : 23 A.L.J. 961.

<sup>75</sup> *Rampratap v. Gaurishankar*, 1924 Bom. 109 : 25 Bom. L.R. 7 : 85 I.C. 464.

<sup>76</sup> *Haribandhu v. Harimohan*, 57 Cal. 931 : 51 C.L.J. 30 : 34 C.W.N. 36 : 1930 Cal. 327.

## APPENDIX II.

## EXECUTION.

## ORDER XXI.

*Execution of Decrees and Orders.*

49. (1) Save as otherwise provided by this rule, property belonging to a partnership shall not be attached or sold in execution of a decree other than a decree passed against the firm or against the partners in the firm as such.

(2) The Court may, on the application of the holder of a decree against a partner, make an order charging the interest of such partner in the partnership property and profits with payment of the amount due under the decree, and may, by the same or a subsequent order, appoint a receiver of the share of such partner in the profits (whether already declared or accruing) and of any other money which may be coming to him in respect of the partnership, and direct accounts and inquiries and make an order for the sale of such interest or other orders as might have been directed or made if a charge had been made in favour of the decree-holder by such partner, or as the circumstances of the case may require.

(3) The other partner or partners shall be at liberty at any time to redeem the interest charged or, in the case of a sale being directed, to purchase the same.

(4) Every application for an order under sub-rule (2) shall be served on the judgment-debtor and on his partners or such of them as are within British India.

(5) Every application made by any partner of the judgment-debtor under sub-rule (3) shall be served on the decree-holder and on the judgment-debtor, and on such of the other partners as do not join in the application and as are within British India.

(6) Service under sub-rule (4) or sub-rule (5) shall be deemed to be service on all the partners, and all orders made on such applications shall be similarly served.

**Principle** :—The general rule is that partnership property shall not be attached or sold in execution of a decree other than a decree passed against the firm or against the partners in the firm as such. But a partner's share in the partnership property is a saleable property within the meaning of section 60,<sup>1</sup> and

<sup>1</sup> *Jagat v. Iswar*, 20 Cal. 693; *Parvathusam v. Bapanna*, 13 Mad. 447; *Dwarika v. Luckmont*, 14 Cal. 384 not foll.

therefore it may be available for the satisfaction of the partner's private debts.. But one of the main principles of partnership law is that no person can be thrust as a partner upon the other partners against their consent and hence to meet both ends provision has been made in sub-rule (2) to charge the interest of a partner in the partnership property where execution is sought against him, appointment of a receiver to receive the profits, etc. of that share and its subsequent sale. Before a sale of the share can be directed, the other partners must be given an opportunity to redeem the interest charged and also to purchase the same, and so notice of the decree-holder's application under sub-rule (2) must be given to them. If they refuse to redeem the interest of the partner or do not take any steps to see that no outsider acquires an interest in the partnership they cannot reasonably complain for the subsequent sale. Where a partner has allowed his share to be charged under the provisions of this rule, the other partners may institute a suit for dissolution under sec. 44 (e), Indian Partnership Act. In directing accounts the provisions of sec. 29 of the Indian Partnership Act should not be ignored and accounts should not be directed except in special circumstances.

**50. (1)** Where a decree has been passed against a firm, execution may be granted—

- Execution of decree against firm.
- (a) against any property of the partnership ;
  - (b) against any person who has appeared in his own name under rule 6 or rule 7 of Order XXX, or who has admitted on the pleadings that he is, or who has been adjudged to be, a partner ;
  - (c) against any person who has been individually served as a partner with a summons and has failed to appear :

Provided that nothing in this sub-rule shall be deemed to limit or otherwise affect the provisions of section 247 of the Indian Contract Act, 1872.

(2) Where the decree-holder claims to be entitled to cause the decree to be executed against any person other than such a person as is referred to in sub-rule (1), clauses (b) and (c) as being a partner in the firm, he may apply to the Court which passed the decree for leave, and where the liability is not disputed, such Court may grant such leave, or, where such liability is disputed, may order that the liability of such person be tried and determined in any manner in which any issue in a suit may be tried and determined.

(3) Where the liability of any person has been tried and determined under sub-rule (2), the order made thereon shall

have the same force and be subject to the same conditions as to appeal or otherwise as if it were a decree.

(4) Save as against any property of the partnership, a decree against a firm shall not release, render liable or otherwise affect any partner therein unless he has been served with a summons to appear and answer.

**Scope of the rule :—**The first requisite for the section is that the decree sought to be executed must be a decree passed *against a firm* under the provisions of Or. 30. If such a decree is passed it may be executed against the property of the firm as a matter of course. If it is sought to be executed against the personal property of the partners it may be so done only if the conditions mentioned in sub-rule (1) (b) and (c) are fulfilled, and if not, leave of the Court must be obtained to make the personal property of the partners available for the satisfaction of such decrees. The whole scope of the rule is to provide that no person shall be held liable in execution of a decree against the firm unless his position as a partner has been in some way established. Sub-rule (1) (b) and (c) lays down certain cases in which it may be safely said that a party knows the suit has been launched against him on the allegation that he is a partner in the firm. In those cases nothing further remains to be decided as regards his liability, but in the absence of any decision or any basis for execution against him, the case put forth under sub-rule (2) arises, and in those cases the party who desires execution against any person must apply to the Court for leave, if the liability is not disputed, the Court grants leave and if the liability is disputed the issue as to partnership has to be tried.<sup>2</sup> All these considerations arise owing to the special rules as to service of summons in suits against a firm. The service may be effected otherwise than upon the partners individually or even upon any of them. Further, a decree against a firm cannot be enforced, except as to partnership property, against a person alleged to be a partner and against whom an application has been made under sub-rule (2) unless he has been served with a summons to appear and answer the application and he has had an opportunity of disputing his liability as a partner if he desires to do so.<sup>3</sup> Where all the members have been individually served with summons, the decree can be executed against them personally though the firm has been declared insolvent and though there has been no application under this rule.<sup>4</sup>

<sup>2</sup> *Natvarlal v. Sassoon*, 51 Bom. 794 : 1927 Bom. 447 : 103 I.C. 256 : 29 Bom.L.R. 921.

<sup>3</sup> *Jagat Chandra v. Gunny Hafee*, 53 Cal. 214 : 30 C.W.N. 11 : 1926 Cal. 271 : 91 I.C. 824.

<sup>4</sup> *Vaishno v. Firm of Tirath Das*, 1925 Lah. 379 : 89 I.C. 138 : 7 L.L.J. 165 : 26 P.L.R. 494.



**Execution of decrees in suits after dissolution :—**In the case of a partnership which has been dissolved to the knowledge of the plaintiff before the institution of the suit, service of summons on every person sought to be made liable is made obligatory by the proviso to Rule 3, Or. 30 which overrides sub-rule (2) of this rule which only applies where there has been no dissolution to the knowledge of the plaintiff.<sup>5</sup> Hence on an application under sub-rule (2) no leave can be granted where the firm is dissolved to the knowledge of the plaintiff before the institution of the suit and the service of summons was not effected on the person sought to be made liable by that application<sup>6a</sup> though the plaintiff may proceed against the assets of the firm.<sup>6</sup> Thus where the retirement of a partner was known to the plaintiff prior to the suit but the plaintiff omitted to serve him with a writ in accordance with the proviso corresponding to the proviso in our Or. 30, rule 3, the plaintiff could not, after judgment had been recovered, obtain any relief in execution against the partner in question, the proviso being imperative.<sup>7</sup>

**Execution against representatives of deceased partner :—**The wording of sub-rule (2) is wide enough to cover the case of a deceased partner, and leave can be granted as against the legal representatives when the partner's death was not within the plaintiff's knowledge before the institution of the suit.<sup>8</sup> But if the firm has been dissolved to the knowledge of the plaintiff prior to the suit and if it is sought to fix the liability on the private estate of a deceased partner apart from his interest in the partnership assets, then the legal representatives must be added as parties to the suit.<sup>8a</sup> In such a case, even if the legal representatives are served with summons but not added as parties, leave cannot be obtained to issue execution against them under this sub-rule.<sup>9</sup> Such would also be the case if the partner dies between the service of the writ and the trial of the action

<sup>5</sup> *Mathuradas v. Ebrahim*, 51 Bom. 986 : 105 I.C. 305 : 1927 Bom. 581 : 29 Bom. L.R. 1295.

<sup>6a</sup> *Ibid.*

<sup>6</sup> *Adiveppa v. Pragfi*, 80 I.C. 773 : 1924 Bom. 366 : 26 Bom. L.R. 388.

<sup>7</sup> *Wigram v. Cox, Sons, Buckley & Co.*, (1894) 1 Q.B. 792.

<sup>8</sup> *Jivraj v. Bhagwandas*, 68 I.C. 627 : 1923 Bom. 66 : 24 Bom. L.R. 1037.

<sup>8a</sup> *Ellis v. Wadson*, (1899) 1 Q.B. 717; *Phillips v. Homfray*, (1883) 24 Ch.D. 439; *Atkins v. Shephard*, (1889) 43 Ch.D. 131.

<sup>9</sup> *Mathuradas v. Ebrahim*, 51 Bom. 986 : 105 I.C. 305 : 1927 Bom. 581 : 29 Bom. L.R. 1296; see, however, *Firm of Gokuldas v. Lachmandas*, 1927 Sind 130 : 100 I.C. 204 F.B. which relied upon *Jivraj v. Bhagwandas*, 68 I.C. 627 : 1923 Bom. 66 : 24 Bom. L.R. 1037 in holding that the representatives could be proceeded against under this sub-rule, but it is respectfully submitted that the Bombay case was decided on the footing that the plaintiff had no knowledge of the dissolution when he brought the suit.

and the judgment.<sup>10</sup> If the plaintiff at the time of his filing his suit knew that a person who was afterwards discovered to be a partner was dead but did not know that he was a partner, execution cannot be issued against the legal representatives of such deceased person in respect of assets in their possession belonging to the deceased partner.<sup>11</sup>

**Order having force of decree :—**An order passed under this sub-rule has the force of decree, and therefore *ad valorem* court fee on the subject matter in dispute must be paid on the memorandum of appeal.<sup>12</sup> But an *ex parte* order granting leave to apply for execution is not a decree nor has it the force of a decree because sub-rule (3) indicates that only such order granting leave as is passed *after dispute* and after the question had been tried and determined as if it were an issue in a suit to have the force of a decree.<sup>13</sup>

**Award :—**The fact that an award is enforced as a decree would attract to itself the applicability of the provisions regarding the execution of decrees.<sup>14</sup> So this rule applies to an award obtained without the intervention of the Court against a firm and made rule of the Court under the provisions of the Arbitration Act.<sup>15</sup>

**Sub-rule (4) :—**This sub-rule is really intended to make clear the implications of sub-rule (1). It does not abrogate sub-rule (2) nor in any sense does it affect its provisions. Its meaning is that a decree against a firm as such will not affect a partner who has not been served with a summons to appear and answer so far as his other property is concerned.<sup>16</sup>

**Power of executing Court to adjudicate question of partnership :—**The executing Court has power to adjudge whether a particular person is or is not a partner of the firm in execution of a decree against the firm.<sup>16a</sup> Where in a suit a person is summoned and he enters appearance stating that he

<sup>10</sup> *Ellis v. Wadeson*, (1899) 1 Q.B. 717.

<sup>11</sup> *Mahomed Yusuf v. Sadullah*, 52 Mad. 885 : 1929 Mad. 733 : 119 I.C. 603 : 1930 M.W.N. 6 : 30 M.L.W. 219 : 57 M.L.J. 344, F.B.

<sup>12</sup> *Jugul Kishore v. Dina Nath*, 1930 Lah. 825; *Punjab National Bank v. Ranchoredas*, 1930 Sind 225.

<sup>13</sup> *Atherton v. Habib*, 115 I.C. 865 : 1929 All. 390 : 1929 A.L.J. 553.

<sup>14</sup> *Adamji v. Shamsudin*, 86 I.C. 1013 : 1925 Sind 293 : 19 S.L.R. 1; *Luis Dreyfus v. Purusottom*, 47 Cal. 29, 33; 56 I.C. 325; *Gladstone Willie & Co. v. Joosub*, 27 C.W.N. 666 : 1924 Cal. 117 : 77 I.C. 868; *Sital v. Clement Robson*, 43 All. 394 : 1921 All. 199 : 61 I.C. 401.

<sup>15</sup> *Mangairmal v. Akbarali*, 112 I.C. 126 : 1929 Sind 29 : 23 S.L.R. 422.

<sup>16</sup> *Jivraj v. Bhagwandas*, 68 I.C. 627 : 1923 Bom. 66 : 24 Bom. L.R. 1037.

<sup>16a</sup> *Jagan Nath v. Buta Mal*, 98 I.C. 855; *Sassoon v. Shivji Ram*, 1929 Lah. 228 : 115 I.C. 536.

is not a partner, and so a decree against the firm is passed in his absence, he may raise a personal defence in proceedings under this sub-rule that he is not a partner of the firm.<sup>17</sup>

## APPENDIX III.

### APPENDIX A OF THE CODE OF CIVIL PROCEDURE.

#### (2) Description of Parties in Particular Cases.

A. B., a firm carrying on business in partnership at

(3) Plaints.

No. 49.

Partnership.

(Title.)

A. B., the above-named plaintiff, states as follows :—

1. He and C. D. the defendant, have been for        years [or months] past carrying on business together under articles of partnership in writing [or under a deed, or under a verbal agreement].

2. Several disputes and differences have arisen between the plaintiff and defendant as such partners whereby it has become impossible to carry on the business in partnership with advantage to the partners. [Or the defendant has committed the following breaches of the partnership articles :—

- (1)
- (2)
- (3)

3. [Facts showing when the cause of action arose and that the Court has jurisdiction].

4. The value of the subject-matter of the suit for the purpose of jurisdiction is rupees        and for the purpose of Court-fees is rupees.

5. The plaintiff claims—

- (1) dissolution of the partnership;
- (2) that accounts be taken;
- (3) that a receiver be appointed.

(N. B.—In suits for winding-up of any partnership, omit the claim for dissolution and instead insert a paragraph stating the facts of the partnership having been dissolved.)

<sup>17</sup> *Chhatibo Lal v. Naraindas*, 56 Cal. 704 : 121 I.C. 403 : 1930 Cal. 53. See also notes under rule 8.

APPENDIX D OF THE CODE OF CIVIL PROCEDURE.

No. 21.

Preliminary Decree in a Suit for Dissolution of Partnership and the taking of Partnership Accounts.

(Title.)

It is declared that the proportionate shares of the parties in the partnership are as follows :—

It is declared that this partnership shall stand dissolved [or shall be deemed to have been dissolved] as from the                      day of                      , and it is ordered that the dissolution thereof as from that day be advertised in the                      Gazette, etc.

And it is ordered that                      be the receiver of the partnership-estate and effects in this suit and do get in all the outstanding book-debts and claims of the partnership.

And it is ordered that the following accounts be taken :—

1. An account of the credits, property and effects now belonging to the said partnership ;
2. An account of the debts and liabilities of the said partnership ;
3. An account of all dealings and transactions between the plaintiff and defendant from the foot of the settled account exhibited in this suit and marked (A), and not disturbing any subsequent settled accounts.

And it is ordered that the good-will of the business heretofore carried on by the plaintiff and defendant as in the plaint mentioned, and the stock-in-trade, be sold on the premises, and that the

\* may, on the application of any of the parties, fix a reserve bidding of all or any of the lots at such sale, and that either of the parties is to be at liberty to bid at the sale.

And it is ordered that the above accounts be taken, and all the other acts required to be done be completed, before the                      day of                      , and that the

do certify the result of the accounts, and that all other acts are completed, and have his certificate in that behalf ready for the inspection of the parties on the                      day of                      .

And, lastly, it is ordered that the suit stands adjourned for making a final decree to the                      day of                      .

No. 22.

Final Decree in a Suit for Dissolution of Partnership and the taking of Partnership Accounts.

(Title.)

It is ordered that the fund now in Court, amounting to the sum of Rs.                      be applied as follows :—

1. In payment of the debts due by the partnership set forth in the certificate of the                      \* amounting on the whole to Rs.                      .

---

\* Here insert name of proper officer.

2. In payment of the costs of all parties in this suit, amounting to Rs. . [These costs must be ascertained before the decree is drawn up.]

3. In payment of the sum of Rs. to the plaintiff as his share of the partnership-assets, of the sum of Rs. , being the residue of the said sum of Rs. now in Court, to the defendant as his share of the partnership-assets.

[Or, and that the remainder of the said sum of Rs. be paid to the said plaintiff [or defendant] in part payment of the sum of Rs. certified to be due to him in respect of the partnership-accounts.]

4. And that the defendant [or plaintiff] do on or before the day of pay to the plaintiff [or defendant] the sum of Rs. being the balance of the said sum of Rs. due to him which will then remain due.

## APPENDIX IV.

### SECTIONS OF THE INDIAN CONTRACT ACT, 1872, RELATING TO PARTNERSHIP.

#### CHAPTER XI.

#### OF PARTNERSHIP.

**239.** "Partnership" is the relation which subsists between persons who have agreed to combine their property, labour or skill in some business, and to share the profits thereof between them.

Persons who have entered into partnership with one another are called collectively a "firm."

#### Illustrations.

(a) A and B buy 100 bales of cotton, which they agree to sell for their joint account; A and B are partners in respect of such cotton.

(b) A and B buy 100 bales of cotton, agreeing to share it between them. A and B are not partners.

(c) A agrees with B, a goldsmith, to buy and furnish gold to B, to be worked up by him and sold, and that they shall share in the resulting profit or loss. A and B are partners.

(d) A and B agree to work together as carpenters, but that A shall receive all profits and shall pay wages to B. A and B are not partners.

(e) A and B are joint owners of a ship. This circumstance does not make them partners.

**240.** A loan to a person engaged or about to engage in any trade or undertaking upon a contract with such person that the lender shall receive interest at a rate varying with the profits or that he shall

Lender not a partner by advancing money for share of profits.

receive a share of the profits, does not, of itself, constitute the lender a partner, or render him responsible as such.

**241.** In the absence of any contract to the contrary, property left in business by retiring partner, or deceased partner's representative. property left by a retiring partner, or the representative of a deceased partner, to be used in the business is to be considered a loan within the meaning of the last preceding section.

**242.** No contract for the remuneration of a servant or agent of any person, engaged in any trade or undertaking, by a share of the profits of such trade or undertaking shall, of itself, render such servant or agent responsible as a partner therein, nor give him the rights of a partner.

**243.** No person, being a widow or child of a deceased partner of a trader and receiving, by way of annuity, a proportion of the profits made by such trader in his business, shall, by reason only of such receipt, be deemed to be a partner of such trader, or be subject to any liabilities incurred by him.

**244.** No person receiving, by way of annuity or otherwise, a portion of the profits of any business, in consideration of the sale by him of the good-will of such business, shall, by reason only of such receipt, be deemed to be a partner of the person carrying on such business, or be subject to his liabilities.

**245.** A person who has, by words spoken or written or by his conduct, led another to believe that he is a partner in a particular firm is responsible to him as partner in such firm.

**246.** Any one consenting to allow himself to be represented as a partner is liable, as such, to third persons who, on the faith thereof, give credit to the partnership.

**247.** A person who is under the age of majority according to the law to which he is subject may be admitted to the benefits of partnership, but cannot be made personally liable for any obligation of the firm; but the share of such minor in the property of the firm is liable for the obligations of the firm.

**248.** A person who has been admitted to the benefits of partnership under the age of majority becomes, on attaining that age, liable for all obligations incurred by the partnership since he was so admitted, unless he gives public notice within a reasonable time, of his repudiation of the partnership.

Liability of minor partner on attaining majority.

**249.** Every partner is liable for all debts and obligations incurred while he is a partner in the usual course of business by or on behalf of the partnership ; but a person who is admitted as a partner into an existing firm does not thereby become liable to the creditors of such firm for anything done before he became a partner.

Partner's liability for debts of partnership.

**250.** Every partner is liable to make compensation to third persons in respect of loss or damage arising from the neglect or fraud of any partner in the management of the business of the firm.

Partner's liability to third person for neglect or fraud of co-partner.

**251.** Each partner who does any act necessary for, or usually done in, carrying on the business of such a partnership as that of which he is a member binds his co-partners to the same extent as if he were their agent duly appointed for that purpose.

Partner's power to bind co-partners.

*Exception.*—If it has been agreed between the partners that any restriction shall be placed upon the power of any one of them, no act done in contravention of such agreement shall bind the firm with respect to persons having notice of such agreement.

#### *Illustrations.*

(a) A and B trade in partnership, A residing in England, and B in India. A draws a bill of exchange in the name of the firm. B has no notice of the bill, nor is he at all interested in the transaction. The firm is liable on the bill, provided the holder did not know of the circumstances under which the bill was drawn.

(b) A, being one of a firm of solicitors and attorneys, draws a bill of exchange in the name of the firm without authority. The other partners are not liable on the bill.

(c) A and B carry on business in partnership as bankers. A sum of money is received by A on behalf of the firm. A does not inform B of such receipt, and afterwards A appropriates the money to his own use. The partnership is liable to make good the money.

(d) A and B are partners. A, with the intention of cheating B, goes to a shop and purchases articles on behalf of the firm, such as might be used in the ordinary course of the partnership business, and converts them to his own separate use, there being no collusion between him and the seller. The firm is liable for the price of the goods.

**252.** Where partners have by contract regulated and defined, as between themselves, their rights and obligations, such contract can be annulled or altered only by consent of all of them, which consent must

Annulment of contract defining partner's rights and obligations.

either be expressed, or be implied from a uniform course of dealing.

*Illustration.*

A, B and C, intending to enter into partnership, execute written articles of agreement, by which it is stipulated that the nett profits arising from the partnership business shall be equally divided between them. Afterwards they carry on the partnership business for many years, A receiving one-half of the nett profits and the other half being divided equally between B and C. All parties know of and acquiesce in this arrangement. This course of dealing supersedes the provision in the articles as to the division of profits.

Rules determining partners' mutual relations, where no contract to contrary.

**253.** In the absence of any contract to the contrary the relations of partners to each other are determined by the following rules:—

- (1) all partners are joint owners of all property originally brought into the partnership stock, or bought with money belonging to the partnership, or acquired for purposes of the partnership business. All such property is called partnership property. The share of each partner in the partnership property is the value of his original contribution, increased or diminished by his share of profit or loss :
- (2) all partners are entitled to share equally in the profits of the partnership business, and must contribute equally towards the losses sustained by the partnership :
- (3) each partner has a right to take part in the management of the partnership business :
- (4) each partner is bound to attend diligently to the business of the partnership, and is not entitled to any remuneration for acting in such business :
- (5) when differences arise as to ordinary matters connected with the partnership business, the decision shall be according to the opinion of the majority of the partners ; but no change in the nature of the business of the partnership can be made, except with the consent of all the partners :
- (6) no person can introduce a new partner into a firm without the consent of all the partners :
- (7) if from any cause whatsoever any member of a partnership ceases to be so, the partnership is dissolved as between all the other members :



- (8) unless the partnership has been entered into for a fixed term, any partner may retire from it at any time :
- (9) where a partnership has been entered into for a fixed term, no partner can, during such term, retire except with the consent of all the partners, nor can he be expelled by his partners for any cause whatever, except by order of Court :
- (10) partnerships, whether entered into for a fixed term or not, are dissolved by the death of any partner.

When Court may dissolve partnership.

**254.** At the suit of a partner the Court may dissolve the partnership in the following cases :—

- (1) when a partner becomes of unsound mind :
- (2) when a partner, other than the partner suing, has been adjudicated an insolvent under any law relating to insolvent debtors :
- (3) when a partner, other than the partner suing, has done any act by which the whole interest of such partner is legally transferred to a third person :
- (4) when any partner becomes incapable of performing his part of the partnership contract :
- (5) when a partner, other than the partner suing, is guilty of gross misconduct in the affairs of the partnership or towards his partners :
- (6) when the business of the partnership can only be carried on at a loss.

Dissolution of partnership by prohibition of business.

**255.** A partnership is in all cases dissolved by its business being prohibited by law.

**256.** If a partnership entered into for a fixed term be

Rights and obligations of partners in partnership continued after expiry of term for which it was entered into.

continued after such term has expired, the rights and obligations of the partners will, in the absence of any agreement to the contrary, remain the same as they were at the expiration of the term, so far as such rights and obligations can

be applied to a partnership dissolvable at the will of any partner.

**257.** Partners are bound to carry on the business of the

General duties of partners.

partnership for the greatest common advantage, to be just and faithful to each other, and to render true accounts

and full information of all things affecting the partnership to any partner or his legal representatives.

Account to firm of benefit derived from transaction affecting partnership.

**258.** A partner must account to the firm for any benefit derived from a transaction affecting the partnership.

*Illustrations.*

(a) A, B and C are partners in trade. C, without the knowledge of A and B, obtains for his own sole benefit a lease of the house in which the partnership business is carried on. A and B are entitled to participate, if they please, in the benefit of the lease.

(b) A, B and C carrying on business together in partnership as merchants trading between Bombay and London. D, a merchant in London, to whom they make their consignments, secretly allows C a share of the commission which he receives upon such consignments, in consideration of C's using his influence to obtain the consignments for him. C is liable to account to the firm for the money so received by him.

**259.** If a partner, without the knowledge and consent of the other partners, carries on any business competing or interfering with that of the firm, he must account to the firm for all profits made in such business, and must make compensation to the firm for any loss occasioned thereby.

**260.** A continuing guarantee, given either to a firm or to a third person, in respect of the transactions of a firm, is, in the absence of agreement to the contrary, revoked as to future transactions by any change in the constitution of the firm to which, or in respect of the transactions of which, such guarantee was given.

**261.** The estate of a partner who has died is not, in the absence of an express agreement, liable in respect of any obligation incurred by the firm after his death.

**262.** Where there are joint debts due from the partnership, and also separate debts due from any partner, the partnership property must be applied in the first instance in payment of the debts of the firm, and, if there is any surplus, then the share of each partner must be applied in payment of his separate debts or paid to him. The separate property of any partner must be applied first in the payment of his separate debts, and the surplus (if any) in the payment of the debts of the firm.

**263.** After a dissolution of partnership, the rights and obligations of the partners continue in all things necessary for winding-up the business of the partnership.

**264.** Persons dealing with a firm will not be affected by a dissolution of which no public notice has been given, unless they themselves had notice of such dissolution.

**265.** Where a partner is entitled to claim a dissolution of partnership, or where a partnership has terminated, the Court may, in the absence of any contract to the contrary, wind up the business of the partnership, provide for the payment of its debts and distribute the surplus according to the shares of the partners respectively.

**266.** Extraordinary partnerships, such as partnerships with limited liability, incorporated partnerships and joint-stock companies, shall be regulated by the law for the time being in force relating thereto.

## APPENDIX V.

### THE ENGLISH PARTNERSHIP ACT, 1890.

53 & 54 VICT. CAP. 39.

#### ARRANGEMENT OF SECTIONS.

##### *Nature of Partnership.*

#### SECTIONS.

1. Definition of partnership.
2. Rules for determining existence of partnership.
3. Postponement of rights of persons lending or selling in consideration of share of profits in case of insolvency.
4. Meaning of firm.  
*Relations of Partners to persons dealing with them.*
5. Power of partner to bind the firm.
6. Partners bound by acts on behalf of firm.
7. Partner using credit of firm for private purposes.
8. Effect of notice that firm will not be bound by acts of partner.
9. Liability of Partners.
10. Liability of the firm for wrongs.
11. Misapplication of money or property received for or in custody of the firm.
12. Liability for wrongs joint and several.
13. Improper employment of trust-property for partnership purposes.

14. Persons liable by "holding out".
15. Admissions and representations of partners.
16. Notice to acting partner to be notice to the firm.
17. Liabilities of incoming and outgoing partners.
18. Revocation of continuing guarantee by change in firm  
*Relations of Partners to one another.*
19. Variation by consent of terms of partnership.
20. Partnership property.
21. Property bought with partnership money.
22. Conversion into personal estate of land held as partnership property.
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## THE ENGLISH PARTNERSHIP ACT, 1890.

### AN ACT TO DECLARE AND AMEND THE LAW OF PARTNERSHIP.

[14th August, 1890.]

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows :

#### *Nature of Partnership.*

1. (1) Partnership is the relation which subsists between  
Definition of partner- persons carrying on a business in  
ship. common with a view of profit.

(2) But the relation between members of any company or association which is—

(a) Registered as a company under the Companies Act, 1862, or any other Act of Parliament for the time being in force and relating to the registration of joint stock companies ; or

(b) Formed or incorporated by or in pursuance of any other Act of Parliament or Letters Patent, or Royal Charter ; or

(c) A company engaged in working mines within and subject to the jurisdiction of the Stannaries :  
is not a partnership within the meaning of this Act.

2. In determining whether a partnership does or does not  
Rules for determining exist, regard shall be had to the follow-  
existence of partnership. ing rules :—

(1) Joint tenancy, tenancy in common, joint property, common property, or part ownership does not of itself create a partnership as to anything so held or owned, whether the tenants or owners do or do not share any profits made by the use thereof.

(2) The sharing of gross returns does not of itself create a partnership, whether the persons sharing such returns have or have not a joint or common right or interest in any property from which or from the use of which the returns are derived.

(3) The receipt by a person of a share of the profits of a business is *prima facie* evidence that he is a partner in the business, but the receipt of such a share, or of a payment contingent on or varying with the profits of a business, does not of itself make him a partner in the business ; and in particular—

(a) The receipt by a person of a debt or other liquidated amount by instalments or otherwise out of the accruing profits of a business does not of itself make him a partner in the business or liable as such :

(b) A contract for the remuneration of a servant or agent of a person engaged in a business by a share of the profits of the business does not of itself make the servant or agent a partner in the business or liable as such :

(c) A person being the widow or child of a deceased partner, and receiving by way of annuity a portion of the profits made in the business in which the deceased person was a partner, is not by reason only of such receipt a partner in the business or liable as such :

(d) The advance of money by way of loan to a person engaged or about to engage in any business on a contract with that person that the lender shall receive a rate of interest varying with the profits or shall receive a share of the profits arising from carrying on the business, does not of itself make the lender a partner with the person or persons carrying on the business or liable as such. Provided that the contract is in writing, and signed by or on behalf of all the parties thereto :

(e) A person receiving by way of annuity or otherwise a portion of the profits of a business in consideration of the sale by him of the goodwill of the business is not by reason only of such receipt a partner in the business or liable as such.

3. In the event of any person to whom money has been advanced by way of loan upon such a

Postponement of rights of person lending or selling in consideration of share of profits in case of insolvency.

contract as is mentioned in the last foregoing section, or of any buyer of a goodwill in consideration of a share of the profits of the business, being adjudged a bankrupt, entering into an

arrangement to pay his creditors less than twenty shillings in the pound, or dying in insolvent circumstances, the lender of

the loan shall not be entitled to recover anything in respect of his loan, and the seller of the goodwill shall not be entitled to recover anything in respect of the share of profits contracted for, until the claims of the other creditors of the borrower or buyer for valuable consideration in money or money's worth have been satisfied.

4. (1) Persons who have entered into partnership with one another are for the purposes of this Act called collectively a firm, and the name under which their business is carried on is called the firm-name.

(2) In Scotland a firm is a legal person distinct from the partners of whom it is composed, but an individual partner may be charged on a decree or diligence directed against the firm, and on payment of the debts is entitled to relief *pro rata* from the firm and its other members.

*Relations of Partners to Persons dealing with them.*

5. Every partner is an agent of the firm and his other partners for the purpose of the business of the partnership; and the acts of every partner who does any act for carrying on in the usual way business of the kind carried on by the firm of which he is a member bind the firm and his partners, unless the partner so acting has in fact no authority to act for the firm in the particular matter, and the person with whom he is dealing either knows that he has no authority, or does not know or believe him to be a partner.

6. An act or instrument relating to the business of the firm and done or executed in the firm-name, or in any other manner showing an intention to bind the firm, by any person thereto authorised, whether a partner or not, is binding on the firm and all the partners.

Provided that this section shall not affect any general rule of law relating to the execution of deeds or negotiable instruments.

7. Where one partner pledges the credit of the firm for a purpose apparently not connected with the firm's ordinary course of business, the firm is not bound, unless he is in fact specially authorised by the other partners; but this section does not affect any personal liability incurred by an individual partner.

8. If it has been agreed between the partners that any restriction shall be placed on the power of any one or more of them to bind the firm, no act done in contravention of the agreement is binding on the firm with respect to persons having notice of the agreement.

Effect of notice that firm will not be bound by acts of partner.

9. Every partner in a firm is liable jointly with the other partners, and in Scotland severally also, for all debts and obligations of the firm incurred while he is a partner; and after his death his estate is also severally liable in a due course of administration for such debts and obligations, so far as they remain unsatisfied, but subject in England or Ireland to the prior payment of his separate debts.

Liability of partners.

10. Where, by any wrongful act or omission of any partner acting in the ordinary course of the business of the firm, or with the authority of his co-partners, loss or injury is caused to any person not being a partner in the firm, or any penalty is incurred, the firm is liable therefor to the same extent as the partner so acting or omitting to act.

Liability of the firm for wrongs.

11. In the following cases; namely—

Misapplication of money or property received for or in custody of the firm.

(a) Where one partner acting within the scope of his apparent authority receives the money or property of a third person and misapplies it; and

(b) Where a firm in the course of its business receives money or property of a third person, and the money or property so received is misapplied by one or more of the partners while it is in the custody of the firm; the firm is liable to make good the loss.

12. Every partner is liable jointly with his co-partners and also severally for everything for which the firm while he is a partner therein becomes liable under either of the two last preceding sections.

Liability for wrongs joint and several.

13. If a partner, being a trustee, improperly employs trust-property in the business or on the account of the partnership, no other partner is liable for the trust-property to the persons beneficially interested therein:

Improper employment of trust-property for partnership purposes.

Provided as follows:—

(1) This section shall not affect any liability incurred by



any partner by reason of his having notice of a breach of trust; and

- (2) Nothing in this section shall prevent trust money from being followed and recovered from the firm if still in its possession or under its control.

14. (1) Every one who by words spoken or written or by conduct represents himself, or who knowingly suffers himself to be represented, as a partner in a particular firm, is liable as a partner to any one who has on the faith of any such representation given credit to the firm, whether the representation has or has not been made or communicated to the person so giving credit by or with the knowledge of the apparent partner making the representation or suffering it to be made.

Persons liable by "holding out."

(2) Provided that where after a partner's death the partnership business is continued in the old firm name, the continued use of that name or of the deceased partner's name as part thereof shall not of itself make his executors or administrators estate or effects liable for any partnership debts contracted after his death.

15. An admission or representation made by any partner concerning the partnership affairs, and in the ordinary course of its business, is evidence against the firm.

Admissions and representations of partners.

16. Notice to any partner who habitually acts in the partnership business of any matter relating to partnership affairs operates as notice to the firm, except in the case of a fraud on the firm committed by or with the consent of that partner.

Notice to acting partners to be notice to the firm.

17. (1) A person who is admitted as a partner into an existing firm does not thereby become liable to the creditors of the firm for anything done before he became a partner.

Liabilities of incoming and outgoing partners.

(2) A partner who retires from a firm does not thereby cease to be liable for partnership debts or obligations incurred before his retirement.

(3) A retiring partner may be discharged from any existing liabilities by an agreement to that effect between himself and the members of the firm as newly constituted and the creditors, and this agreement may be either express or inferred as a fact from the course of dealing between the creditors and the firm as newly constituted.

18. A continuing guaranty or cautionary obligation given either to a firm or to a third person in respect of the transactions of a firm is, in the absence of agreement to the contrary, revoked as to future transactions by any change in the constitution of the firm to which, or of the firm in respect of the transactions of which, the guaranty or obligation was given.

*Relations of Partners to one another.*

19. The mutual rights and duties of partners, whether ascertained by agreement or defined by this Act, may be varied by the consent of all the partners, and such consent may be either express or inferred from a course of dealing.

20. (1) All property and rights and interests in property originally brought into the partnership stock or acquired, whether by purchase or otherwise, on account of the firm, or for the purposes and in the course of the partnership business, are called in this Act partnership property, and must be held and applied by the partners exclusively for the purposes of the partnership and in accordance with the partnership agreement.

(2) Provided that the legal estate or interest in any land, or in Scotland the title to and interest in any heritable estate, which belongs to the partnership, shall devolve according to the nature and tenure thereof, and the general rules of law thereto applicable, but in trust, so far as necessary, for the persons beneficially interested in the land under this section.

(3) Where co-owners of an estate or interest in any land or in Scotland in any heritable estate, not being itself partnership property, are partners as to profits made by the use of that land or estate, and purchase other land or estate out of the profits to be used in like manner, the land or estate so purchased belongs to them, in the absence of an agreement to the contrary, not as partners, but as co-owners for the same respective estates and interests as are held by them in the land or estate first mentioned at the date of the purchase.

21. Unless the contrary intention appears, property bought with money belonging to the firm is deemed to have been bought on account of the firm.

22. Where land or any heritable interest therein has become partnership property, it shall, unless the contrary intention appears, be treated as between the partners (including the representatives of a deceased partner), and also as between the heirs of a

deceased partner and his executors or administrators, as personal or moveable and not real or heritable estate.

23. (1) After the commencement of this Act a writ of execution shall not issue against any partnership property for a partner's separate judgment debt.

(2) The High Court, or a judge thereof, or the Chancery Court of the county palatine of Lancaster, or a county court, may, on the application by summons of any judgment creditor of a partner, make an order charging that partner's interest in the partnership property and profits with payment of the amount of the judgment debt and interest thereon, and may by the same or a subsequent order appoint a receiver of that partner's share of profits (whether already declared or accruing), and of any other money which may be coming to him in respect of the partnership, and direct all accounts and inquiries, and give all other orders and directions which might have been directed or given if the charge had been made in favour of the judgment creditor by the partner, or which the circumstances of the case may require.

(3) The other partner or partners shall be at liberty at any time to redeem the interest charged, or in case of a sale being directed, to purchase the same.

(4) This section shall apply in the case of a cost-book company as if the company were a partnership within the meaning of this Act.

(5) This section shall not apply to Scotland.

24. The interests of partners in the partnership property and their rights and duties in relation to the partnership shall be determined, subject to any agreement express or implied between the partners, by the following rules:

Rules as to interests and duties of partners subject to special agreement.

(1) All the partners are entitled to share equally in the capital and profits of the business, and must contribute equally towards the losses whether of capital or otherwise sustained by the firm.

(2) The firm must indemnify every partner in respect of payments made and personal liabilities incurred by him—

(a) In the ordinary and proper conduct of the business of the firm ; or,

(b) In or about anything necessarily done for the preservation of the business or property of the firm.

(3) A partner making, for the purpose of the partnership, any actual payment or advance beyond the amount of capital which he has agreed to subscribe, is entitled to interest at the

the rate of five per cent. per annum from the date of the payment or advance.

(4) A partner is not entitled, before the ascertainment of profits, to interest on the capital subscribed by him.

(5) Every partner may take part in the management of the partnership business.

(6) No partner shall be entitled to remuneration for acting in the partnership business.

(7) No person may be introduced as a partner without the consent of all existing partners.

(8) Any difference arising as to ordinary matters connected with the partnership business may be decided by a majority of the partners, but no change may be made in the nature of the partnership business without the consent of all existing partners.

(9) The partnership books are to be kept at the place of business of the partnership (or the principal place, if there is more than one), and every partner may, when he thinks fit, have access to and inspect and copy any of them.

25. No majority of the partners can expel any partner unless a power to do so has been conferred by express agreement between the partners.

Power to expel partner.

26. (1) Where no fixed term has been agreed upon the duration of the partnership, any partner may determine the partnership at any time on giving notice of his intention so to do to all the other partners.

Retirement from partnership at will.

(2) Where the partnership has originally been constituted by deed, a notice in writing, signed by the party giving it, shall be sufficient for this purpose.

27. (1) Where a partnership entered into for a fixed term is continued after the term has expired, and without any express new agreement, the rights and duties of the partners remain the same as they were at the expiration of the term, so far as is consistent with the incidents of a partnership at will.

Where partnership for term is continued over, continuance on old terms presumed.

(2) A continuance of the business by the partners or such of them as habitually acted therein during the term, without any settlement or liquidation of the partnership affairs, is presumed to be a continuance of the partnership.

28. Partners are bound to render true accounts and full information of all things affecting the partnership to any partner or his legal representatives.

Duty of partners to render accounts, &c.

29. (1) Every partner must account to the firm for any benefit derived by him without the consent of the other partners from any transaction concerning the partnership, or from any use by him of the partnership property name or business connection.

(2) This section applies also to transactions undertaken after a partnership has been dissolved by the death of a partner, and before the affairs thereof have been completely wound up, either by any surviving partner or by the representatives of the deceased partner.

30. If a partner, without the consent of the other partners, carries on any business of the same nature as and competing with that of the firm, he must account for and pay over to the firm all profits made by him in that business.

31. (1) An assignment by any partner of his share in the partnership, either absolute or by way of mortgage or redeemable charge, does not, as against the other partners, entitle the assignee, during the continuance of the partnership, to interfere in the management or administration of the partnership business or affairs, or to require any accounts of the partnership transactions, or to inspect the partnership books, but entitles the assignee only to receive the share of profits to which the assigning partner would otherwise be entitled, and the assignee must accept the account of profits agreed to by the partners.

(2) In case of a dissolution of the partnership, whether as respects all the partners or as respects the assigning partner, the assignee is entitled to receive the share of the partnership assets to which the assigning partner is entitled as between himself and the other partners, and, for the purpose of ascertaining that share, to an account as from the date of the dissolution.

### *Dissolution of Partnership and its Consequences.*

32. Subject to any agreement between the partners, a partnership is dissolved—

- (a) If entered into for a fixed term, by the expiration of that term :
- (b) If entered into for a single adventure or undertaking, by the termination of that adventure or undertaking :
- (c) If entered into for an undefined time, by any partner giving notice to the other or others of his intention to dissolve the partnership.

In the last-mentioned case the partnership is dissolved as from the date mentioned in the notice as the date of dissolution, or, if no date is so mentioned, as from the date of the communication of the notice.

33. (1) Subject to any agreement between the partners, every partnership is dissolved as regards all the partners by the death or bankruptcy of any partner.

(2) A partnership may, at the option of the other partners, be dissolved if any partner suffers his share of the partnership property to be charged under this Act for his separate debt.

34. A partnership is in every case dissolved by the happening of any event which makes it unlawful for the business of the firm to be carried on or for the members of the firm to carry it on in partnership.

35. On application by a partner the Court may decree a dissolution by the dissolution of the partnership in any of the following cases :

(a) When a partner is found lunatic by inquisition, or in Scotland by cognition, or is shown to the satisfaction of the Court to be of permanently unsound mind, in either of which cases the application may be made as well on behalf of that partner by his committee or next friend or person having title to intervene as by any other partner :

(b) When a partner, other than the partner suing, becomes in any other way permanently incapable of performing his part of the particular contract :

(c) When a partner, other than the partner suing, has been guilty of such conduct as, in the opinion of the Court, regard being had to the nature of the business, is calculated to prejudicially affect the carrying on of the business :

(d) When a partner, other than the partner suing, wilfully or persistently commits a breach of the partnership agreement, or otherwise so conducts himself in matters relating to the partnership business that it is not reasonably practicable for the other partner or partners to carry on the business in partnership with him :

(e) When the business of the partnership can only be carried on at a loss :

(f) Whenever in any case circumstances have arisen which, in the opinion of the Court, render it just and equitable that the partnership be dissolved.

36 (1) Where a person deals with a firm after a change in its constitution he is entitled to treat all apparent members of the old firm as still being members of the firm until he has notice of the change.

Rights of persons dealing with firm against apparent members of firm.

(2) An advertisement in the London Gazette as to a firm whose principal place of business is in England or Wales, in the Edinburgh Gazette as to a firm whose principal place of business is in Scotland, and in the Dublin Gazette as to a firm whose principal place of business is in Ireland, shall be notice as to persons who had not dealings with the firm before the date of the dissolution or change so advertised.

(3) The estate of a partner who dies, or who becomes bankrupt, or of a partner who, not having been known to the person dealing with the firm to be a partner, retires from the firm, is not liable for partnership debts contracted after the date of the death, bankruptcy, or retirement respectively.

37. On the dissolution of a partnership or retirement of a partner any partner may publicly notify the same, and may require the other partner or partners to concur for that purpose in all necessary or proper acts, if any, which cannot be done without his or their concurrence.

38. After the dissolution of a partnership the authority of each partner to bind the firm, and the other rights and obligations of the partners, continue notwithstanding the dissolution so far as may be necessary to wind up the affairs of the partnership, and to complete transactions begun but unfinished at the time of the dissolution, but not otherwise.

Provided that the firm is in no case bound by the acts of a partner who has become bankrupt, but this proviso does not affect the liability of any person who has after the bankruptcy represented himself or knowingly suffered himself to be represented as a partner of the bankrupt.

39. On the dissolution of a partnership every partner is entitled, as against the other partners in the firm, and all persons claiming through them in respect of their interests as partners, to have the property of the partnership applied in payment of the debts and liabilities of the firm, and to have the surplus assets after such payment applied in payment of what may be due to the partners respectively after deducting what may be due from them as partners to the firm; and for that purpose any partner or his representatives may on the termination of the partnership apply to the Court to wind up the business and affairs of the firm.

40. Where one partner has paid a premium to another on entering into a partnership for a fixed term, and the partnership is dissolved before the expiration of that term otherwise than by the death of a partner,

Apportionment of premium where partnership prematurely dissolved.

the Court may order the repayment of the premium, or of such part thereof as it thinks just, having regard to the terms of the partnership contract and to the length of time during which the partnership has continued ; unless

(a) the dissolution is, in the judgment of the Court, wholly or chiefly due to the misconduct of the partner who paid the premium, or

(b) the partnership has been dissolved by an agreement containing no provision for a return of any part of the premium.

41. Where a partnership contract is rescinded on the

Rights where partnership dissolved for fraud or misrepresentation.

ground of the fraud or misrepresentation of one of the parties thereto, the party entitled to rescind is, without prejudice to any other right, entitled—

(a) to a lien on, or right of retention of, the surplus of the partnership assets, after satisfying the partnership liabilities, for any sum of money paid by him for the purchase of a share in the partnership and for any capital contributed by him, and is

(b) to stand in the place of the creditors of the firm for any payments made by him in respect of the partnership liabilities, and

(c) to be indemnified by the person guilty of the fraud or making the representation against all the debts and liabilities of the firm.

42. (1) Where any member of a firm has died or otherwise

Right of outgoing partner in certain cases to share profits made after dissolution.

ceased to be a partner, and the surviving or continuing partners carry on the business of the firm with its capital or assets without any final settlement of accounts as between the firm and the

outgoing partner or his estate, then, in the absence of any agreement to the contrary, the outgoing partner or his estate is entitled at the option of himself or his representatives to such share of the profits made since the dissolution as the Court may find to be attributable to the use of his share of the partnership assets, or to interest at the rate of five per cent. per annum on the amount of his share of the partnership assets.

(2) Provided that where by the partnership contract an option is given to surviving or continuing partners to purchase the interest of a deceased or outgoing partner, and that option is duly exercised, the estate of the deceased partner, or the outgoing partner or his estate, as the case may be, is not entitled to any further or other share of profits ; but if any partner assuming to act in exercise of the option does not in all material respects comply with the terms thereof, he is liable to account under the foregoing provisions of this section.



43. Subject to any agreement between the partners, the amount due from surviving or continuing partners to an outgoing partner or the representatives of a deceased partner in respect of the outgoing or deceased partner's share is a debt accruing at the date of the dissolution or death.

44. In settling accounts between the partners after a dissolution of partnership, the following rules shall, subject to any agreement, be observed:

(a) Losses, including losses and deficiencies of capital, shall be paid first out of profits, next out of capital, and lastly, if necessary, by the partners individually in the proportion in which they were entitled to share profits:

(b) The assets of the firm including the sums, if any, contributed by the partners to make up losses or deficiencies of capital shall be applied in the following manner and order:

1. In paying the debts and liabilities of the firm to persons who are not partners therein:

2. In paying to each partner rateably what is due from the firm to him for advances as distinguished from capital:

3. In paying to each partner rateably what is due from the firm to him in respect of capital:

4. The ultimate residue, if any, shall be divided among the partners in the proportion in which profits are divisible.

*Supplemental.*

45. In this Act, unless the contrary intention appears,—  
 Definitions of "court" and "business". The expression "Court" includes every Court and judge having jurisdiction in the case.

The expression "business" includes every trade, occupation, or profession.

46. The rules of equity and of common law applicable to partnership shall continue in force except so far as they are inconsistent with the express provisions of this Act.

47. (1) In the application of this Act to Scotland the bankruptcy of a firm or of an individual shall mean sequestration under the Bankruptcy (Scotland) Acts, and also in the case of an individual the issue against him of a decree of cessio bonorum.

(2) Nothing in this Act shall alter the rules of the law of Scotland relating to the bankruptcy of a firm or of the individual partners thereof.

48. The Acts mentioned in the schedule to this Act are hereby repealed to the extent mentioned in the third column of that schedule.
- Repeal.
49. This Act shall come into operation on the first day of January one thousand eight hundred and ninety-one.
- Commencement of Act.
- Short title.
50. This Act may be cited as the Partnership Act, 1890.

## SCHEDULE.

## ENACTMENTS REPEALED.

Session and Chapter.	Title or Short Title.	Extent of Repeal.
19 & 20 Vict. c. 60	The Mercantile Law Amendment (Scotland) Act, 1856.	Section seven. <sup>1</sup>
19 & 20 Vict. c. 97	The Mercantile Law Amendment Act, 1856.	Section four. <sup>1</sup>
28 & 29 Vict. c. 86	An Act to amend the law of partnership.	The whole Act. <sup>2</sup>

## APPENDIX VI.

## FORM No. 1.

## DEED OF PARTNERSHIP.

*[The deed must be registered under sec. 17, Indian Registration Act, if the partnership involves immoveable property worth Rs. 100 or more.]*

## Stamp Duty :—

Where the capital of the partnership does not exceed

Rs. 50      ...      Rs. 2/8

(Rs. 5 in Bengal, Madras, Bombay and Assam; Rs. 3/12 in United Provinces; Rs. 7/8 in United Provinces where the capital exceeds Rs. 500 but does not exceed Rs. 2000).

In any other case      ...      Rs. 10

(Rs. 20 in Bengal, Madras, Bombay and Assam; Rs. 15 in United Provinces where the capital exceeds Rs. 2000).

Some of the clauses mentioned below are implied in every contract of partnership unless there is anything express to the contrary in the agreement of the parties. But the partners may not be lawyers conversant with the particulars of law on the subject, and hence express mention of those clauses may remind them of their mutual rights and duties. Should it, however, be desired to shorten the deed, the starred clauses may be omitted.

<sup>1</sup> See sec. 18.

<sup>2</sup> See sec. 2 (3), (b), (c), (d), and (e) and sec. 3.

This deed of partnership made this.....day of..... 193..... between X, Y and Z of.....Witneseth as follows:—

1. The said X, Y and Z will become and remain as partners in the business hereinafter mentioned from the date of these presents (or for a term of.....years from the date of these presents if they or any two of them shall so long live) subject to the provision of determination hereinafter contained, and a statement in the prescribed form stating the firm name, the principal place of the business of the firm, the date of the formation of the partnership, names in full and permanent addresses of the partners and the duration of the firm, signed and verified by each of the partners shall be sent to the Registrar of Firms within two months of these presents.

2. The partners shall carry on the business of.....under the name and style of.....and no partner shall enter into an engagement on behalf of the firm except in the firm name and no change in the nature of the business of the partnership shall be made except with the consent of all the partners.

3. The business of the partnership shall ordinarily be carried on at.....or at such other place or places as the partners or a majority of them shall from time to time agree upon after giving notice of the same to the Registrar of Firms.

4. The capital of the partnership shall consist of Rs.....to be paid to the credit of the firm by the partners in equal shares immediately on the execution of these presents and no partner shall be entitled to any interest on the capital subscribed by him save and except as provided for hereinafter.

Or

4. The capital of the partnership shall consist of Rs. 1,000 of which Rs. 500 is to be paid to the credit of the firm by X immediately on the execution of these presents and Rs. 500 representing the value of the machinery, etc., as detailed in the schedule below belonging to and brought in by Y as his contribution to the common stock to be taken over and become the property of the said partnership is to be credited to the said Y in the books of the partnership as his part of the capital, and Z shall be a partner on account of his labour and skill in the conduct of the partnership business, and no partner shall be entitled to any interest on the capital subscribed by him save and except as provided for hereinafter.

5. The partners shall share the profits of the business in equal shares and the same shall be divided between them within.....days of the settlement of the annual general accounts as provided for in clause 9 of these presents.

6. Any partner making, for the purpose of the business, any payment or advance beyond the amount of his own share of the capital shall be entitled to interest thereon at the rate of 6 per cent. per annum, and if the amount of payment or advance and interest due thereon be not paid within two months of the next annual general accounts, he shall be entitled to refer to arbitration for recovering the same without asking for dissolution of the partnership and for general accounts.

7.\* All outgoings and expenses of the partnership and all losses including deficiencies of capital shall be paid out of the profits first and

out of the capital next, and if the same shall be deficient then by the partners in equal shares.

8.\* Proper books of account shall be kept by the partners at the place of business and each partner shall at all reasonable times be entitled to have access to and to take copies of the same.

9. During the continuance of the partnership, a general account of the assets and liabilities and transactions of the partnership shall be taken in each year on the.....day of.....and the same shall be entered in.....books and signed by each partner and after such signature each partner shall keep one of such books and shall be bound by such account which will not be reopened except where a partner may have been induced to sign it by false and fraudulent representations, or in ignorance of material circumstances dishonourably concealed from him by his co-partners, or in respect of manifest errors signified to the others within.....calendar months after signature as aforesaid when such errors may be rectified.

10. In anticipation of his share of profits, each partner may draw out of the partnership business a sum not exceeding Rs....., either at one time or in instalments, in course of one financial year of the firm according to which the annual general accounts are taken, and if on taking annual general accounts he shall be found to have drawn more than his share of the profits for that year, he shall immediately refund the excess, with interest at 6 per cent. per annum.

11.\* Every partner shall have a right to take part in the management of the business, and no partner shall be entitled to any remuneration for taking part in the conduct of the business save and except his own share of profits.

12.\* Every partner shall be bound to attend diligently to his duties in the conduct of the business.

13.\* Any difference, as to ordinary matters connected with the business, except as to change in the nature of business, shall be decided by a majority of the partners and every partner shall have a right to express his opinion before the matter is decided.

14. Every partner shall be entitled to be indemnified by his other partners in respect of payments made and liabilities incurred by him in the ordinary and proper conduct of the business, and in doing such act, in an emergency, for the purpose of protecting the firm from loss, as would be done by a person of ordinary prudence, in his own case, under similar circumstances, and if the amount that may be found to be due to him, be not paid within two months of the next annual general accounts, he shall be entitled to refer to arbitration for recovering the same without asking for dissolution of the partnership and for general accounts.

15.\* Every partner shall indemnify the firm for any loss caused to it by his fraud or wilful neglect in the conduct of the business of the firm.

16.\* The property of the firm shall include all property and rights and interests in property originally brought into stock of the firm, or acquired, by purchase or otherwise, by or for the firm, or for the purposes and in the course of the business of the firm and shall include the goodwill of the business and any property purchased with money belonging to the firm.

17.\* The property of the firm shall be held and used by the partners exclusively for purposes of the business.

18. No partner shall, during the continuance of the partnership, without the consent of the other partners given in writing, do any of the following things :

- (a) Be either directly or indirectly engaged or interested in any trade or business competing with the business of the partnership.
- (b) Lend any money or deliver on credit any goods belonging to or otherwise give credit on behalf of the partnership, or speculate in the funds of the partnership.
- (c) Give any security or undertaking for payment of money on account of the partnership.
- (d) Compromise or relinquish any claim or portion of a claim by the firm.
- (e) Enter into any bond or become surety for any person or do or knowingly permit to be done anything whereby the capital or property of the partnership may be seized, attached, or taken in execution.
- (f) Assign or mortgage his share or interest in the partnership or introduce or attempt to introduce any other person into the business of the partnership.
- (g) Open a banking account on behalf of the firm in his own name.
- (h) Take a lease on behalf of the firm of immoveable property.
- (i) Transfer immoveable property belonging to the firm.
- (j) Enter into partnership on behalf of the firm.
- (k) Hire or dismiss any clerk, traveller or other servant of the partnership, which authority is vested in A alone.
- (l) Enter into any contract for the purchase of property, or goods exceeding the value of Rs.....
- (m) Refer to arbitration any dispute in which the partnership is concerned with a third party whether or not a suit in Court has been instituted for the same.
- (n) Admit any liability in a suit or proceeding against the firm.
- (o) Acknowledge any debt due from the partnership so as to extend the period of limitation for a suit for the recovery of such a debt.

18 (a). Each partner shall have power to draw, accept or indorse bills or cheques in the name of the firm in the usual course of business.

19. Partners shall carry on the business of the partnership for the greatest advantage of the partners and every partner shall be bound to make good to the partnership any loss which is due to his acts which he was forbidden to do.

20. Every partner shall punctually pay and discharge his separate debts and liabilities and shall keep the partnership effectually indemnified against the same.

21. The partnership shall not be dissolved by the adjudication of any partner as an insolvent, nor by the death or retirement of a partner.

22\*. During the continuance of the partnership any partner may be expelled by a majority of the partners exercising power in this behalf in good faith after giving him reasonable opportunity for explanation and for meeting the case against him; and notice of the expulsion shall be given to the Registrar of Firms and published in the local official Gazette and in a vernacular newspaper circulating in the district where the firm has its place of business.

23.\* The rights and liabilities of an expelled partner shall be the same as if he were a retired partner under the terms and conditions herein contained.

24. Any partner may retire from the partnership by giving to the other partners not less than 2 calendar months' previous notice in writing of his intention to do so, or by leaving such notice at a place where the business of the partnership is for the time being carried on, and at the expiration of such notice the partnership shall terminate as regards him, and notice of the retirement shall also be given by the partner to the Registrar of Firms specifying the date of retirement and published in the local official Gazette and in the local vernacular newspaper as aforesaid.

25. On the death of a partner the surviving partners shall give notice to his son, executors or representatives within a month of the death that they are entitled to take his place, and if the latter elect to join the partnership within a month of the said notice, clauses 26 to 30 shall not apply, and notice of the same shall be given to the Registrar of Firms within two months of the exercise of the option.

26.\* The representatives of a deceased partner or the outgoing partner shall not be liable for any loss suffered, or for any act of the surviving or remaining partners done, after the death or public notice of retirement.

27. In the event of retirement of a partner, or refusal by the legal representatives of the deceased partner to become partners or on the expiry of the period given to them to become partners, the other partners shall have the power to purchase his share by giving to him or his legal personal representatives notice in writing to that effect within 2 calendar months of the receipt of notice of retirement, refusal by the legal personal representatives to become partners or the expiry of the period given to them in the notice to become partners on terms as hereinafter contained, and should the remaining or surviving partners fail to exercise their option of purchase within the said period the partnership shall stand dissolved as on the expiry of the last date of the said period, or, before the expiry of the said period, the remaining or surviving partners may, in the alternative, and at their option, dissolve the partnership in both of which cases the final accounts would be taken and the rights and liabilities of the partners and their representatives settled in accordance with the provisions of sec. 48 of the Indian Partnership Act of 1932.

28. In lieu of the interests of a deceased partner or retiring partner in the firm, if the death or retirement occurs before the first annual general account, the representatives of the deceased partner or the outgoing partner shall be entitled to his share of the capital together with interest at the rate of 6 p.c. per annum till the death or retirement, and in the case of death or retirement after any annual general account, to a sum representing the value of the share of the capital and property of the partnership

as ascertained in that annual general account and also to interest on the same at the rate aforesaid, and the amount thus ascertained shall be payable at once and shall bear interest at the rate of 12 p.c. per annum till payment.

29. When a partner retires or dies and he or his representatives are paid what is due in respect of his share in accordance with the terms herebefore mentioned, the continuing or surviving partners shall jointly and severally indemnify him or them in respect of all payments involuntarily made on account of the outstanding debts of the firm.

30. The surviving or continuing partners and the representatives of the deceased partner or the outgoing partner shall execute and do at the cost of the former all such deeds, documents and things which shall be necessary or expedient for the purpose respectively of indemnifying, or vesting all interests in, the executors.

\*31. A partner ceasing to be a partner shall not carry on any business similar to that of the firm within the limits of.....for..... years.

OR

\*31. An outgoing partner shall be entitled to carry on a business competing with that of the firm and he may advertise such business but he shall not use the name of the firm, nor represent himself as carrying on the business of the firm nor solicit the custom of persons who were dealing with the firm before he ceased to be a partner.

\*32. The mutual rights and duties of partners as detailed in these presents shall continue to be the same in case of a change in the firm or in its business, (or where the business is continued after the expiry of the term as stated in clause 2 of these presents).

33. \*Any partner shall be entitled to dissolve the partnership by giving notice to the other partners of his intention to dissolve the partnership and the partnership would be dissolved as from the date of dissolution mentioned in the notice, or, if no date is so mentioned, as from the date of the communication of the notice, and notice of the dissolution shall also be given to the Registrar of Firms specifying the date thereof and published in the local official Gazette and in a vernacular paper as aforesaid. [*Omit if the partnership is not a partnership at will*].

34. \*After dissolution of the firm but before its affairs have been completely wound up no partner or his representatives shall carry on a similar business in the firm name or use any of the property of the firm for his own benefit.

35. Any partner including an outgoing partner or the representative of a deceased partner, may, on dissolution of the partnership, sign in the name of the firm and publish in the official Gazette or in the vernacular newspaper as aforesaid a proper notice of the dissolution of the partnership.

36. Upon the final determination of the partnership a general account shall be taken of the assets and liabilities and the transactions of the partnership, and settled in accordance with the provisions of the Indian Partnership Act of 1932 and each partner shall execute and do all such deeds, documents and things as may be necessary or convenient for effecting the speedy winding up of the partnership affairs, and for such mutual indemnity and release as may be required.

37. All differences arising between partners or their representatives or assignees, or any of them with regard to the interpretation of these presents, or as to the rights or liabilities of the partners or any of them under these presents or with regard to the winding up of or any matter or thing relating to the partnership or to the affairs thereof, shall be referred to arbitration and the following persons shall be chosen as arbitrators and reference to arbitration shall be a condition precedent to the right of any partner to sue on any of the above counts.

## SCHEDULE.

In witness whereof we the executants set our hands and seal this the.....day of.....19...

## FORM No. 2.

## DEED FOR DISSOLUTION OF PARTNERSHIP.\*

(Stamp duty : Rs. 5. Rs. 10 in Bengal, Madras, Bombay, United Provinces and Assam.)

*The deed is compulsorily registrable under secs. 17 and 49, Registration Act, if it involves immoveable property worth Rs. 100 or more.<sup>1</sup>*

This deed of dissolution of partnership made the.....day of .....19..... between A of the one part and B and C of the other part, hereinafter called the First and Second Party respectively.

Whereas the said parties have hitherto carried on business in partnership under the deed of partnership dated.....day of.....19... under which the capital and assets of the partnership belong to the partners in equal shares. And whereas the property of the partnership consists of the goodwill of the partnership business, stock-in-trade, materials, book-debts, contracts, effects used in the said business or belonging to the partnership and immoveable properties as described in Schedule below which stand in the name of..... in trust for the said parties. And whereas it has been agreed between the said parties that the partnership shall be dissolved as regards the First Party as from the.....day of.....19... and notice of such dissolution has been signed by the parties for insertion in the Gazette and in a vernacular newspaper circulating in the district where the firm had its place of business and for communication to the Registrar of Firms for the correction of the Register. And whereas it has been further agreed between the parties that the Second Party shall carry on the said business of the partnership as from the.....day of..... of 19... and shall take over all debts and liabilities of the partnership outstanding on the same date and indemnify the First Party in the manner hereinafter appearing and shall pay to the First Party the net value of his share in the goodwill and property of the partnership as on the said.....day of.....19... And whereas a general account has been taken and valuation made of the goodwill, assets and liabilities of the partnership, and it has been agreed that the net value of the share of the First Party after providing for all

\* Adopted mainly from Pollock's Digest of the Law of Partnership.  
<sup>1</sup> *Samuvul v. Ramasubhter*, 55 Mad. 72 : 35 C.W.N. cxlvii.



liabilities of the said partnership as on the said.....day of.....19...  
is the sum of Rs.....

Now this deed witnesseth that in pursuance of the said agreement the said parties hereby declare that the partnership between them be hereby dissolved as regards the First Party as from the said.....day of.....19... and in consideration of the sum of Rs..... now paid to the First Party by the Second Party the First Party as beneficial owner hereby assigns and transfers to the Second Party all that undivided..... part or share of the First Party of and in the goodwill, stock-in-trade, materials, book-debts, contracts, immoveable properties as described in Schedule below and effects of the said partnership, to hold the same unto the Second Party absolutely. And for the purpose of giving to the Second Party the full benefit of the assignment hereby made, the First Party as regards the share hereby assigned by him, hereby appoints the Second Party, their survivors and representatives and assigns his attorneys in their joint names or otherwise to realise by suit or otherwise all credits, moneys and things of the said partnership hereby dissolved and to give effectual receipts and discharges for the same and for such purposes to appoint a substitute or substitutes and to revoke such substitution. And the said parties mutually release each other from the articles of partnership dated the.....day of .....19... and from all claims and demands thereunder or in relation thereto. And the First Party hereby covenants with the Second Party that he will not hereafter for a period of .....years carry on or be interested in carrying on a business competing with that of the said partnership within a radius of.....miles from the town of..... And the Second Party hereby jointly and severally covenant with the First Party that the Second Party, their representatives and assigns or one of them will pay all debts and liabilities of the said partnerships hereby dissolved outstanding on the said day of.....and will, as from the.....day of.....pay and discharge all debts and liabilities of the said partnership, and will at all times keep indemnified the First Party and his representatives against all costs, damages and expenses, claims and demands in respect thereof and also by reason of any action or proceeding which may be brought or instituted by the Second Party, their survivors, representatives or assigns or any of them or other person or persons by virtue of the power of attorney hereinbefore contained, or for any act, matter or thing in relation thereto.

#### SCHEDULE.

In witness whereof the parties set their hands and seal this the..... day of.....19...

#### FORM No. 3.

##### NOTICE OF DISSOLUTION.

*To be published in the local official Gazette and in a vernacular newspaper circulating in the district where the firm has its place of business.*

*Notice should also be given to the Registrar of Firms by a partner or his agent or person specially authorised in this behalf.*

Notice is hereby given that the partnership heretofore subsisting between X, Y and Z under articles of partnership dated.....and carrying on business at.....under the style of.....and registered

at.....in the Register of Firms on.....has been dissolved as from the.....day of.....19... All debts and claims owing by and due to the said firm will be paid and received by X who has been authorised by Y and Z to give effectual receipts and discharges for all debts and claims due to the firm, and to do all such things as may be necessary to wind up the affairs of the firm and to complete transactions begun but unfinished at the time of dissolution.

Signature of the partner or  
partners giving notice.

Dated.....

#### FORM NO. 4.

##### NOTICE OF DISSOLUTION ON RETIREMENT OF A PARTNER.

*To be given as in Form No. 3.*

Notice is hereby given that the partnership heretofore subsisting between X, Y and Z under articles of partnership dated.....and carrying on business at.....and registered in the Register of Firms on.....has been dissolved as from the.....day of.....19.....in so far as the said X is concerned who retires from the firm. All debts and claims owing by and due to the firm will be paid and received by the said Y and Z who will alone continue to carry on the business under the old style and who have been jointly and severally authorised to give effectual receipts and discharges for all debts and claims due to the firm. The said X will not be liable for any act done by Y and Z or any one of them or by anybody acting on their behalf after the said date of retirement.

Signature of the partner  
giving notice.

Dated.....

#### FORM NO. 5.

##### NOTICE OF RETIREMENT OF A PARTNER.

*To be given as in Form No. 3.*

Notice is hereby given that as from the.....day of.....19..... I shall retire from the firm consisting of Y and Z and myself under articles of partnership dated the.....day of.....19....., hitherto carrying on business at.....under the style of.....and registered at.....in the Register of Firms on.....and that I shall not be liable for any act done by Y and Z or any of them or anybody acting on their behalf from and after the said date of retirement.

Signature of X.

Dated.....

#### FORM NO. 6.

##### NOTICE OF RETIREMENT OF A PARTNER TO HIS CO-PARTNERS.

*Form X to Y and Z.*

Take notice that as from the.....day of..... 19... I shall retire from the firm consisting of you and me under articles of partnership dated the .....day of.....19... which firm was duly registered at .....in the Register of Firms on.....

Signature of X.

Dated.....

## FORM NO. 7.

## NOTICE OF EXPULSION.

*To be given as in Form No. 3.*

Where as X, Y and Z have been hitherto carrying on busyness in partnership under articles of partnership dated the.....day of..... 19... under the style of.....and whereas the said firm has been registered at.....in the Register of Firms on.....and whereas the said partner X has been expelled from the firm in pursuance of a resolution passed in a meeting of the partners on the.....day of..... 19..., notice is hereby given to all whom it may concern that the said business will henceforth be carried on by Y and Z alone under the old style, and neither Y, Z nor the firm will be liable for any act done by X or anybody acting on his behalf after that date.

Signature of partners X and Y.

Dated.....

## FORM NO. 8.

## NOTICE BY A MINOR ON ATTAINING MAJORITY.

*To be given as in Form No. 3.*

Whereas from the.....day of.....19... I was admitted to the benefits of partnership of the firm consisting of X, Y and Z carrying on business at.....under articles of partnership dated the.....day of .....19... and under the style of.....and registered at.....in the Register of Firms on....., and whereas I have attained majority on the.....day of.....19... notice is hereby given to all whom it may concern that I have elected to become a partner of the said firm as from this date [or that I have elected not to become a partner of the said firm and my share of property and of profits of the said firm shall not be henceforth liable for any acts of the said firm].

Signature of the person  
giving notice.

Dated.....

## APPENDIX VII.

## RULES OF THE LAHORE HIGH COURT.

To rule 1 of Order XXX the following explanation shall be added :—

*Explanation.*—"This rule applies to a joint Hindu family trading partnership."

## RULES OF THE MADRAS HIGH COURT.\*

## MADRAS CIVIL RULES OF PRACTICE.

\* \* \* \* \*

## PARTNERSHIP SUITS.

114. In a suit for dissolution of partnership, or for an account of partnership dealings, all the partners, and  
Parties. all persons entitled to share in the profits of the partnership business, shall be made parties. The plaint may be as in Form No. 38.

\* The editor is indebted to Sastri's edition for these rules.

115. If, at any time, it appears to the Court that any party has not had inspection of the books of account or papers of the partnership, either through his own neglect or the default of any other party, the Court may order the same to be produced for his inspection at the court-house, or other convenient place; and if any party alleges that the books of the partnership do not correctly set forth all the dealings and transactions of the firm, or contain items or transactions not proper to be included therein, the Court shall direct such party to file a written statement giving particulars of the errors or irregularities complained of, as in Form No. 39. The hearing of the suit shall then be adjourned, and the party in default may be ordered to pay the cost of the adjournment.

116. If any party desires to impeach a settled account on the ground of error, he shall in his plaint or written statement set out the specific errors or irregularities alleged by him; if on the ground of fraud, or of a mistake affecting the whole account, he shall in his plaint or written statement set out full particulars of the fraud or mistake alleged by him.

117. If, at the first hearing of the suit, the partnership and the terms thereof, and the correctness of the books of account, are admitted, and it is only necessary to take an account, the Court may at once pass an interim decree specifying the account to be taken, and the manner of taking the same.

118. At the hearing of the suit the Court shall determine the persons who are partners of the firm, and who are entitled to share the profits thereof, and the proportions in which they are entitled to share profits and are liable for losses, and also whether the books of the partnership have been regularly and properly kept and correctly represent the transactions and dealings of the partnership, or, if any allegations have been made in this behalf by any party, whether there are any errors or irregularities therein or any party has been guilty of fraud in respect thereof. If the Court finds that there are errors or irregularities in the accounts, or that fraud has been committed, it shall declare generally the nature of the said errors or irregularities, or fraud, or the particular transaction in respect of which the same has been committed, as in Form No. 35.

119. At the hearing of the suit, the Court shall also determine what accounts are to be taken, and from what dates, and give such directions as may be necessary for taking the same, in manner prescribed by rules 100-110 and shall direct what notice, if any, is to be given, by advertisements in the local newspapers or otherwise, of the dissolution of the partnership. The Court may if a receiver has not been previously appointed, appoint a receiver of the assets of the partnership. The Court shall then pass an interim decree in Form No. 40 or Form No. 41 and shall adjourn the further hearing of the suit to a fixed day.

120. In the case of a settled account, if errors or irregularities are proved, the Court may either rectify particular items, or give liberty to any party to file a statement of objection and surcharge; if fraud or a mistake affecting the whole account is proved the Court may direct an account to be taken from the date of the settlement of accounts, if any, preceding the fraud or mistake.

121. If a commissioner is appointed to take an account he shall take the same in accordance with the directions and findings of the Court, as contained in the interim decree; and, except as aforesaid, none of the matters in rules 118 and 119 mentioned shall be referred to or dealt with by a commissioner.

122. When the accounts of the firm have been duly taken, and approved by the Court, it shall pass an order providing for the discharge of the debts and liabilities of the firm, and for the retention in Court of a sum sufficient for payment of any costs, charges, and expenses of the suit, properly payable out of assets, and adjourn the suit to a fixed day.

123. If the assets exceed the debts and liabilities of the firm, and if the parties agree to retain the assets in their hands respectively, on account of their respective shares in the firm, the order in rule 122 mentioned may also provide for the payment of any balances which may be due by the firm to any of the parties, after debiting them with the estimated value of the assets in their hands. The order may be in Form No. 42, or if a commissioner has been appointed to take the accounts, or a receiver has been appointed, in Form No. 43. If the parties apply for the distribution of the assets in any other manner, the order may direct the realisation of sufficient assets to discharge the debts and liabilities of the firm, and to provide for equality of partition, as in Form No. 44. At the adjourned hearing the Court may, if the terms of the said order have been complied with, pass a final decree in Form Nos. 45, 46, or 47, according to the circumstances of the case.

124. If the debts and liabilities exceed the assets of the partnership, or the parties do not consent to a distribution of the assets, the Court shall direct the balances due from the several partners to be paid into court, and the assets to be realised, as in Form No. 44; and if at the adjourned hearing it appears that the debts and liabilities have been fully discharged, the Court may pass final decree in Form No. 46 omitting paragraph 4 thereof.

125. If any party ordered to make any payment, or to do any other act, fails to comply with the order of the Court, any other party may apply that a receiver may be appointed to collect and realise the assets of the firm, and for an injunction to restrain the party in default from retaining, or parting or dealing in any manner with, the said assets.

126. An order for an injunction in a partnership suit, an order on appeal varying the interim decree, and an order on appeal from a final decree reversing the same and appointing a receiver, may be as in Forms Nos. 48, 49, and 50 respectively.

Note :—(1) The forms have not been reproduced here. (2) Similar Rules are framed for the original side of the High Courts of Madras. O. XXX of the H. C. Rules.

## APPENDIX VIII.

## REPORT OF THE SPECIAL COMMITTEE.

To

HIS EXCELLENCY THE GOVERNOR GENERAL IN COUNCIL.

In accordance with the Legislative Department Resolution No. 354-I./29C. & G., dated the 24th March, 1930 (Appendix A), we, the members of the Committee appointed by the Government of India to examine the provisions of the Bill to amend the law relating to partnership, have the honour to submit the following report :—

1. The constitution of the Committee was as follows :—

*Chairman.*

The Honourable Sir Brojendra Lal Mitter, Kt., Bar.-at-Law, Law Member of the Council of the Governor General.

*Members.*

- (1) Sir Dinshah Fardunji Mulla, Kt., C.I.E., M.A., LL.B., Advocate, Bombay.
- (2) Mr. Alladi Krishnaswami Ayyar, Advocate-General, Madras.
- (3) Mr. Arthur Eggar, M.A., Bar.-at-Law, Government Advocate, Rangoon.

Mr. D. G. Mitchell, C.I.E., I.C.S., Officiating Secretary to the Government of India, Legislative Department, attended the meetings of the Committee, and Mr. A. deC. Williams, I.C.S., Deputy Secretary in the same Department, acted as Secretary to the Committee.

2. The engagements of some of its members prevented the Committee from meeting for some time, but it assembled at New Delhi on the 3rd of November, 1930, when its first meeting was held, and it continued its deliberations daily until Monday, the 17th. A Bill to define and amend the law relating to partnership, with notes setting forth the reasons for its various provisions which had already been prepared in the Legislative Department, was placed before us and formed the basis of our discussions.

3. In paragraph 8 of the Report of the Special Committee on the Sale of Goods Bill, which was adopted as the Statement of Objects and Reasons to that Bill, it was said :—

“When Sir James Stephen moved the Indian Contract Bill, he admitted that it was not and could not pretend to be, a complete code upon the branch of law to which it related. He, however, expressed a hope that in later years it would be easy to enact supplementary chapters relating to the several branches of the law of contract which the Bill did not touch. This hope has never been fulfilled. In later years it was found more convenient to have separate enactments for the several branches of the law of contract, e.g., the Transfer of Property Act, the Negotiable Instruments Act, and the Merchant Shipping Act. In our opinion, in view of the complexity of modern conditions, the time has now come when this process should be accelerated by embodying the different branches of law relating to contract in separate self-contained enactments; and we hope that the Bill which we attach to our Report may be passed into law at an early date and may be but the first of the series required to complete the task which we have outlined above.”

The present Bill is the second of the series foreshadowed by the Special Committee, and like its predecessor it is based on the corresponding English Act, in this case the Partnership Act, 1890 (53 and 54 Vict.

c. 39). The law relating to partnership is at present contained in Chapter XI of the Indian Contract Act, 1872, which was based on the rules included in the Report of the Indian Law Commission presided over by Lord Romilly, in 1866. These rules were based on English precedents. The main object then in view was, in the words of Sir James Stephen who piloted the Indian Contract Bill through the Council, "that of providing a body of law to the Government of the country so expressed that it might be readily understood both by English and Indian Government servants without extrinsic help from the English law libraries." With that object in view the Select Committee on the Indian Contract Bill, in its Report dated 22nd February, 1870, said that many important matters relating to partnership were left unnoticed in Chapter XI. In addition to these omissions the development of trade in India has shown further matters on which legislation is now required. In the absence of clear and definite rules on these points Indian Courts have held that Chapter XI of the Indian Contract Act is not exhaustive and have relied on analogies drawn from the English law. In regard to partnership the position is much the same as that in regard to the sale of goods, and the remarks of the Special Committee on the Sale of Goods Bill in paragraph 6 of their Report may be repeated with cogency:—

"Whatever merit the simple and elementary rules embodied in the Indian Contract Act may have had, and however sufficient and suitable they may have been for the needs which they were intended to meet in 1872, the passage of time has revealed defects the removal of which has become necessary in order to keep the law abreast of the developments of modern business relations."

4. The Special Committee showed that the English Sale of Goods Bill was "a very successful and correct codification of this branch of the mercantile law" and that it had been adopted in most of the British Possessions and many of the United States of America, with only such small variations as were found necessary to adapt its provisions to local circumstances. The Special Committee, therefore, adopted the Sale of Goods Act, 1893, as the source of the Indian Sale of Goods Bill, and modified it only to the small extent required to adapt it to Indian conditions. The Bill as drafted by them became the Indian Sale of Goods Act, 1930 (Act III of 1930), with a few minor modifications.

5. The English Partnership Act, 1890, affords both a comparison with and a contrast to the Sale of Goods Act, 1893. The law it contains has been adopted in nearly all the British Dominions and Colonies and it also forms the basis of a uniform Partnership Act which is in force in the United States of America. Herein it affords a comparison with the Sale of Goods Act and there can be no doubt that if its provisions are closely followed in India, the commercial community will derive great advantages. Sir Courtenay Ilbert has remarked:

"Experience shows that whenever Parliament passes a good law carefully framed like the Bill of Exchange Act or the Sale of Goods Act, Legislatures in other parts of the British Dominions readily copy it or adapt it. This would presumably be the best mode of obtaining such kind and amount of uniformity in commercial legislation throughout the Empire as is in existing circumstances feasible and desirable." (*Vide* the article on Unification of Commercial Law in Vol. II of the *Journal of Comparative Legislation*).

The Partnership Act, 1890, has received some approval from legal commentators, and is generally recognised as a useful code embodying most of the law applicable to modern partnerships. In the Introduction to the 9th Edition of Lindley on Partnership it is said that the Act "has the merit of reducing a mass of law, previously undigested except by private authors, into a series of propositions authoritatively expressed."

6. The Partnership Act, 1890, however, has not been such a successful piece of codification as the English Sale of Goods Act, 1893, and herein lies the contrast. The full context of the quotation from Lindley given above runs as follows :—

“Opinions will naturally differ as to the utility of statutes which deal with important branches of law, but which do not profess to deal with them exhaustively. No doubt an incomplete piece of work is unsatisfactory; but it does not follow that such a work is not worth executing; if it is well done as far as it goes, it may be a great boon; and the Partnership Act, 1890, although imperfect, has the merit of reducing a mass of law, previously undigested except by private authors, into a series of propositions authoritatively expressed and as carefully considered as any Act of Parliament is likely to be.”

The learned author of the treatise proceeds to discuss the difficulty of passing a considered code of law on a technical subject through a democratic Legislature like Parliament and he concludes :

“Taken as a whole the law of England, both civil and criminal, is well adapted to the requirements of the English people; but it sadly wants methodising and authoritative revision; and any such revision of any branch of it is a distinct gain. From this point of view the Act in question (*i.e.*, the Partnership Act, 1890) is decidedly useful, although it is by no means a perfect measure, nor even as good as Parliament might have made it.”

These remarks have encouraged us to depart from the precedent of the Sale of Goods Bill, where the English Act was modified in a few particulars only, and to use the Partnership Act, 1890, with some degree of freedom. Nevertheless, the Bill does not alter in any substantial way the English law of partnership or the Indian law of partnership, which is based thereon. The main principles are the same, and likewise all important details. The deviations in principle it does show are on minor points, and have been introduced in order to adapt the law to Indian conditions or to supplement it in places where it is incomplete, or are supported by the views of authoritative commentators. Further, the wording of clearly defined principles in the Partnership Act, 1890, has been freely adopted. Admittedly, any change in the wording of the English Act may have the disadvantage of making useful English decisions difficult to apply to Indian cases, but it is anticipated that the practical identity in substance of the two Acts and the similarity in wording of important provisions will avoid this undesirable result and will attract to difficult cases in India the benefits of English judicial experience.

7. The main source of the difference between the Bill and the Partnership Act, 1890, lies in the greater emphasis given in the Bill to the personality of a firm. On this subject Lindley remarks on page 4 :—

“One feature peculiar to the English law of partnership, and distinguishing it from the laws of other European countries and of Scotland, was the persistency with which the firm, as distinguished from the partners composing it, was ignored both at law and in equity. As no one can owe money to himself, it was held that no debt could exist between any member of a firm and the firm itself; and although Courts of Equity, in winding up the concerns of a firm, treated the firm as the debtor or creditor of its members as the case might be, yet this was only for purposes of book-keeping, and in order to arrive at the net balance to be paid to or by each of the partners on the ultimate settlement of their accounts. This non-recognition of the firm was a defect in the law of partnership; and it is to be regretted that the Partnership Act did not go further than it did in the direction of assimilating the English law to the Scotch. Had it done so, the difficulties of suing and



being sued and of dealing with partners abroad, would have been greatly diminished."

8. The Bill goes some way to meet Lindley's criticism but it adheres strictly to the old established English and Indian view that a firm is not a legal person. The emphasis above referred to arises from two causes, the first of which is a mere matter of wording. The English Act defines the word "partnership" as being "the relation which subsists between persons carrying on a business in common with a view to profit," and, as regards a "firm" it says that "persons who have entered into partnership with one another are for the purposes of this Act called collectively a firm." It appears that the framers of the English Act wished throughout to lay stress on the abstract relation of partnership and to avoid giving colour to the view that the firm has any degree of personality, for in the Act the term "partnership" is frequently used in the sense of "firm," and also as an adjective in the sense of "belonging to a firm" or "relating to a firm." The use of the defined word "firm" seems almost to be avoided. The Bill confines the word "partnership" to its legitimate defined meaning of the relation which exists between partners, and wherever the partners themselves are referred to collectively it uses the word "firm." Hence the word "firm" occurs very frequently in the Bill, whereas the word "partnership" occurs rarely, and thereby the Bill, as compared with the English Act, emphasises the concrete thing, the firm, as against the abstract relation, the partnership.

9. The second cause of the emphasis is very largely a matter of arrangement. The strict view of the existing law, placing full stress upon the abstract relation of partnership, is that "on any change amongst the persons comprising a partnership there is in fact a new partnership" (Lindley, page 166). This, however, is not the practical or commercial view of a firm, whereunder a firm has a sufficient degree of personality and of continuity to justify such common-places as advertisements which claim that a firm has been established for over a century. Even the English Law as expressed in the Partnership Act, 1890, has been forced to depart from the strict legal view of the firm, for it speaks of changes in a firm, or persons dealing with a firm after a change in its constitution, of debts due from the firm to a partner, and uses other phrases conceding some degree of personality to the firm, and of continuity in its existence in spite of internal changes. The Bill goes in this direction to the limits which are already implied in the English Act; and it collects together in a separate Chapter, entitled "Incoming and outgoing partners" all provisions which directly bear upon the introduction, retirement, expulsion, insolvency and death of partners in those cases where the business of the firm is carried on without a dissolution of partnership. The result is that, apart from the preliminary Chapter and the Chapter on "The nature of partnership," the Bill has three Chapters which deal with the working firm, namely,—

Chapter III.—Relations of partners to one another,

Chapter IV.—Relations of partners to third parties,

Chapter V.—Incoming and Outgoing Partners,

and one Chapter relating to the extinction of a firm, namely,—

Chapter VI.—Dissolution of a firm.

10. We hope that this re-arrangement of the Partnership Act, 1890, will be of practical convenience to lawyers and business men in that very numerous class of cases where there is a change in the constitution of a firm without a dissolution. The new Chapter V contains a number of concise propositions setting out the legal consequences flowing from changes in the personnel of a firm when there is no dissolution, which are embodied in various sections of the English Act scattered through-

out all three of its parts. The re-arrangement has also the advantage of confining Chapter VI strictly to provisions relating to the dissolution of a firm and its legal consequences. But we must emphasise again that in so re-arranging the English Act we have not departed from any of its outstanding conceptions or principles.

11. One of us would prefer to go much further and would propose that, for the whole of Chapter II and clauses (a) and (b) of clause 2, the following should be substituted :—

“4. (1) A ‘firm’ is an association of persons who have joined together for the purpose of conducting some kind of lawful trade, profession, calling or enterprise, as a business venture, with the object of obtaining profit by dealing with third parties, each of the members of the association being in the position of a principal in all such dealings.

(2) The members of a firm are called ‘partners’; their mutual relationship is called ‘partnership’; the name under which the business is carried on is called the ‘firm name’; and an ‘act of the firm’ is an act or omission in which all the partners are deemed to take part.

5. Every firm shall be deemed to be constituted by a contract between the partners whereby they agree that their partnership shall be governed by the Articles of Partnership stated in the schedule :

Provided that the partners may, at any time, expressly or impliedly agree to terms of partnership to the contrary of, or in addition to, such Articles.”

According to this scheme, the Articles of Partnership in the Schedule would include all provisions of the Bill which relate to such of the mutual rights and duties of partners as are subject to contract between the partners. This scheme would relegate practically the whole of Chapter III and portions of Chapters IV, V and VI to the Schedule. The rest of us, however, consider that this scheme would be too sweeping an innovation, and we prefer to have the whole of the law set out and logically arranged in the statute itself.

12. In addition to the pure law of partnership the Bill contains an important new Chapter on the registration of firms—Chapter VII. The history of the proposals for some measure of this kind in India goes as far back as 1867, when the Bombay Chamber of Commerce first made the suggestion that legislation should be undertaken for the compulsory registration of firms. The step was then deemed to be impracticable, but ever since at frequent intervals various mercantile bodies, sometimes supported by Local Governments, have pressed for some such legislation in the interests of the trading public. The movement was strengthened by the passing of the Registration of Business Names Act, 1916 (5 ad 6 George V c. 58), which furnished a useful precedent. This Act *inter alia* makes the registration of all firms compulsory, attaches a penalty to failure to register, and renders persons who are in default incapable of bringing a suit to enforce their claims as partners, whether against their co-partners or against third parties. In 1918 the Industrial Commission recommended a system of compulsory registration, and in 1925 the Civil Justice Committee made specific recommendations somewhat on the lines of the Registration of Business Names Act, 1916, but excepting firms with a capital below Rs. 500. In 1920 the legislature of Burma passed the Burma Registration of Business Names Act, 1920, which applied the principle of compulsory registration to certain towns in Burma.

13. All the proposals made at various times were considered by the Government of India, but, owing either to lack of unanimity among

the proposers or to difficulties in the proposals themselves, no conclusions were come to which could form the basis of a Bill which held any promise of a successful passage through the Indian legislature. These difficulties related to—

- (1) Hindu undivided families,
- (2) short-lived partnerships, and
- (3) firms in a small way of business,

and a short discussion of these will disclose the reasons why nothing so far has been done, and will help to explain the present proposals.

14. A Hindu undivided family may carry on a family business exclusively for its own benefit, or it may carry on a business with one or more outsiders as partners with the family. To require that each member of such a family should have his name registered in a register of firms has all along been deemed to be an impracticable step. Every male child born would have to be registered, and every death or partition that occurred would involve changes in the register. It has been recognised that such a proposal would be resented by the Hindu community and probably would not be effective. However, this difficulty may be avoided, as was pointed out by the present Law Member in his evidence before the Industrial Commission in 1918. A Hindu undivided family carrying on a family business may have many of the characteristics of a firm, but it is not a firm. Partnership arises only from contract and is not created by status or obtained by birth. The law of partnership has no application to these families, whose internal relations and liabilities for the acts of members are governed entirely by the Hindu law. Even in the case where a trading family enters into partnership with outsiders no special provision for the registration of its members is needed. As partnership arises only from contract, only that member who makes the contract of partnership with outsiders can be considered to be a partner. He may or he may not represent the whole family, and only his interest or the whole joint family property may be liable for the debts of the firm; but these are questions of fact mainly, or, where they are mixed questions of fact and law, the law is not that of partnership but is the Hindu law. If the partner member does represent the family and if his share of the profits of the firm goes into the family stock, then the whole of the joint family property will be liable for the debts of the firm. But if the partner member is trading on his own responsibility and keeps the profits to himself then the creditors of the firm cannot realise their claims against the firm from the joint family property, beyond the extent of the interest of the partner member. It will be seen that the principles of law involved are principles of the Hindu law, and that they are the same principles which are applied to all dealings by the manager or representative of the joint family.

15. No attempt to smooth the path of litigation against a Hindu undivided family has been made, for example, in the recent Transfer of property (Amendment), Act, 1929, or Sale of Goods Act, 1930, though the difficulties exist on a much greater scale in connection with mortgages and sales by Hindu families generally than in connection with the restricted class of the mercantile transactions of Hindu trading families. It is submitted that the attempt need not be made now, for the limited purpose of partnership, to the prejudice of the passing of an otherwise useful measure.

16. The difficulties connected with short-lived partnerships and with firms in a small way of business may be considered together. It has been pointed out repeatedly with much force that to require small or ephemeral joint ventures to be registered would produce little public benefit and would act as a clog on petty enterprise; and such ventures

are so numerous that any small benefit to be derived from registration would be counterbalanced by the clerical labour involved. Hence, there have been proposals, like that of the Civil Justice Committee, that firms with less than a certain capital should be exempt, or that the disability to sue arising from non-registration should apply only to suits above a certain value; but none of these proposals have survived examination. The capital of a firm may be an elusive quantity and it is frequently a fluctuating quantity; and to use the valuation of a suit in order to determine whether the suit lies or not is likely to lead to improper devices and to perjury. The Bill seeks to overcome this class of difficulty by making registration optional, and by creating inducements to register which will only bear upon firms in a substantial and fairly permanent way of business.

17. The outlines of the scheme are briefly as follows. The English precedent in so far as it makes registration compulsory and imposes a penalty for non-registration has not been followed, as it is considered that this step would be too drastic for a beginning in India, and would introduce all the difficulties connected with small and ephemeral undertakings. Instead, it is proposed that registration should lie entirely within the discretion of the firm or partner concerned; but, following the English precedent, any firm which is not registered will be unable to enforce its claims against third parties in the civil courts; and any partner who is not registered will be unable to enforce his claims either against third parties or against his fellow partners. One exception to this disability is made—any unregistered partner in any firm, registered or unregistered, may sue for dissolution of the firm. This exception is made on the principle that registration is designed primarily to protect third parties, and the absence of registration need not prevent the disappearance of an unregistered or imperfectly registered firm. Under this scheme a small firm, or a firm created for a single venture, not meeting with difficulty in getting payment, need never register; and even a firm with a large business need not register until it is faced with litigation. Registration may then be effected at any time before the suit is instituted. The rights of third parties to sue the firm or any partner are left intact.

18. Once registration has been effected the statements recorded in the register regarding the constitution of the firm will be conclusive proof of the facts therein contained against the partners making them, and no partner whose name is on the register will be permitted to deny that he is a partner,—with certain natural and proper exceptions which will be indicated later. This should afford a strong protection to persons dealing with firms against false denials of partnership and the evasion of liability by the substantial members of a firm.

19. The framing of inducements to register changes in a firm has been difficult, but the devices proposed in the Bill are put forward as being as strong as may be created, in the absence of a penal sanction and without altering any of the established principles of partnership law. As regards a partner newly introduced into the firm, if he fails to register he will incur a grave risk of being unable to claim his dues from his partners, and will have to rely solely on their good faith or sue for dissolution. On the other hand, the third party who deals with a firm and knows that a new partner has been introduced can either make registration of the new partner a condition for further dealings, or content himself with the certain security of the other partners and the chance of proving by other evidence the partnership of the new but unregistered partner. A third party who deals with a firm without knowing of the addition of a new partner counts on the credit of the old partners only, and will not be prejudiced by the failure of the new partner to register.

20. As regards outgoing partners the Bill provides that the estate of a deceased partner or of an insolvent partner is in no case liable for the acts of the firm after his death or insolvency. This rule is well established and is hard and fast. Nothing in the way of registration of the death or insolvency of a partner, therefore, can improve the position of third parties, and no inducement need be offered, beyond the desire which will actuate most firms to keep their entry in the register up to date, for the information and benefit of intending customers. These are the exceptions mentioned above, where the existence of a name on the register may not establish the partnership of the person named.

21. As regards retired or expelled partners, who are legally on the same footing, there will be strong inducement to have the changes noted in the register. The law provides that a retired or an expelled partner continues to be liable for the acts of the firm, and the firm continues to be liable for any act of theirs purporting to be done on behalf of the firm, until public notice is given of the retirement or expulsion. Clause 71 of the Bill (sec. 72) provides that this public notice can be given as regards retirement and expulsion only by notice to the Registrar, which will be recorded in the register. Hence, when a partner retires or is expelled, it will be in his own interest and also in the interest of the remaining partners to give immediate notice of the change to the Registrar.

22. Similar considerations apply when a firm is dissolved. All the partners will still be liable for the acts of any of them which would have bound the firm if done before its dissolution until public notice is given. Here again, it will be in the interest of all the partners that early notice should be given, and this can only be done by notice to the Registrar.

23. To sum up, it is anticipated that once a firm has been registered the register of firms will continue to contain a complete and up to date list of all partners who will be liable for the debts of the firm to persons who propose to deal with the firm.

24. One more point regarding the registration of firms calls for mention. It is proposed that the chapter, in so far as it provides machinery for registration, amendment of the register, grant of copies and so forth, should come into force along with the rest of the Bill, so that firms may apply for registration at once. The clause regarding the conclusive nature of the statements recorded in the register will come into force at the same time. However, it would obviously be unjust to make all unregistered firms and partners incapable of suing until they have had a reasonable opportunity to register; and it is proposed that they should be allowed one year, by enacting that the clause rendering them incapable of suing shall not come into force until one year after the commencement of the rest of the Act.

25. It has already been indicated that the Bill contains other provisions which are not contained in the Partnership Act, 1890. These are considered in detail in the Notes on Clauses, but one set of provisions is important enough to justify its mention in this Report. In the Introduction to Lindley page 8 it is said, under the marginal head "Goodwill":

"One matter of great practical importance and of some difficulty is unfortunately not dealt with, *i.e.*, the goodwill of a dissolved firm and the extent to which, and the persons by whom, the use of its name may be continued. Sir Frederick Pollock's Bill dealt with these points; as did also the Bill which passed the House of Commons in 1889, and the Bill which was brought into the House of Lords in 1890. But owing, it is believed, to differences of opinion, and to the difficulty of

arriving at a conclusion which would be acceptable to both Houses of Parliament, the clauses relating to these subjects were struck out. The law upon them must therefore be extracted from judicial decisions and the doubts and difficulties which beset questions arising on these subjects must remain for future judicial or legislative solution."

Perhaps a reason for the differences of opinion on the clauses relating to goodwill was that they were framed generally, and not with application to the goodwill of firm only. Sir Frederick Pollock himself says in his Digest of the Law of Partnership (12th Edn., pages 121-22) :

"The Act does not make any express provision for disposing of the goodwill on the dissolution of a firm. Probably this is due to the consideration that the rules of law relating to goodwill are not confined to cases where a business has been carried on in partnership, and therefore do not belong to the law of partnership in any exact sense. Nevertheless, the rules have been settled chiefly by decisions in partnership cases, and the question of goodwill is one of those which ought always to be considered and provided for in the formation of a partnership, and constantly has to be considered on its dissolution, whether provided for or not."

It is considered that the views of these two eminent writers should be followed, and accordingly provision is made in the Bill for the disposal of the goodwill of a firm. Provisions governing the sale of goodwill generally would be out of place, but they are of sufficient importance in their bearing on firms to justify their inclusion in a restricted form. There is perhaps no statute on the Indian Statute Book where general provisions could find a logical place, but it is hoped that the provisions now proposed for the goodwill of firms will be found to contain principles which may be used as a general guide.

26. The Bill as settled by us is given in Appendix B, and detailed notes on the various clauses in Appendix C to this Report.\*

In conclusion, we desire to place on record our great sense of obligation to Mr. D. G. Mitchell, who took part in our deliberations and rendered us great assistance in drafting the clauses of the Bill and in preparing our Report; and also to Mr. A. deC. Williams who made arrangements for us and also took part in our deliberations until unfortunately he fell sick.

D. F. MULLA,  
14th December, 1930.  
A. KRISHNASWAMI,  
24th December, 1930.  
A. EGGAR,  
24th December, 1930.  
B. L. MITTER,  
5th January, 1931.

## APPENDIX A.

### RESOLUTION.

New Delhi, the 24th March, 1930.

No. 354-I./29-C. & G.—The Government of India have had under consideration the desirability of amending and bringing up to date the law relating to partnership. It is proposed that the changes should be embodied in a self-contained enactment which will replace that portion

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\*Appendix C, Notes on Clauses, are not reprinted here as necessary portions have been incorporated in the notes under sections of the Act.

of the Indian Contract Act, 1872, which deals with this subject. A preliminary draft Bill has already been prepared which the Governor General in Council has decided to remit to a small committee of experts before it is introduced in the Indian Legislature. The previous examination of a highly technical piece of legislation of this character by a committee composed of lawyers of eminence will, he feels assured, command general approval. The committee will be constituted as follows :—

*Chairman.*

The Honourable Sir Brojendra Lal Mitter, Kt., Bar-at-Law, Law Member of the Council of His Excellency the Governor General.

*Members.*

Sir Dinshah Fardunji Mulla, Kt., C.I.E., M.A., LL.B., Advocate, Bombay,  
Mr. Alladi Krishnaswami Ayyar, Advocate-General, Madras, and  
Mr. Arthur Eggar, M.A., Bar-at-Law, Government Advocate, Rangoon.

The committee will meet in Simla by the first week of May, 1930. The Government of India hope to introduce the Bill during the next session of the Indian Legislature.

ORDER.—Ordered that copies of the Resolution be forwarded to the Governments of Madras and Burma, the Home, Finance and Commerce Departments, Sir Dinshah Mulla, Mr. A. Krishnaswami Ayyar and Mr. A. Eggar for information.

Ordered also that the Resolution be published in the *Gazette of India*.

L. GRAHAM,

*Secretary to the Government of India.*

(Gazette of India, 1930, Part I, page 280).

## APPENDIX IX.

### REPORT OF THE SELECT COMMITTEE.

The following Report of the Select Committee on the Bill to define and amend the law relating to partnership was presented to the Legislative Assembly on the 26th January 1932 :—

We, the undersigned, Members of the Select Committee to which the Bill to define and amend the law relating to partnership was referred, have considered the Bill and the papers noted in the margin, and have now the honour to submit this our Report, with the Bill as amended by us annexed thereto.

2. Clause 1 (sec. 1).—We propose that the Act generally should come into force on 1st October 1932, and section 68 (present sec. 69) a year later. This arrangement should provide ample opportunity to the public to become acquainted with the new law, especially with the Chapter on Registration, and to Government to make arrangements for giving effect to that Chapter.

Clauses 5 to 8 (Clause 5 is sec. 6, 6 is sec. 5, 7 is sec. 6, Expl. 1, 8 is sec. 6 Expl. 2).—We have transposed clause 6 so as to make it clause 5; and we have transformed clauses 7 and 8 into Explanations

attached to clause 6 (original clause 5). We consider that this re-arrangement will make it clearer that the sharing of profits, gross return, etc., is strong evidence of partnership, though not in itself conclusive evidence. The clauses, as originally arranged, might have had the effect of diminishing the value of these facts as evidence.

Towards the end of Explanation 2 (original clause 8) we have made a drafting amendment, by substituting for the category of "lender, servant, agent, etc." the single word "receiver" covering it.

Clause 11-A (sec. 10) is considered along with clause 14.

Clause 13 (sec. 12).—The provision in sub-clause (d), providing that the books of the firm shall be kept at its place of business, or, where there is more than one such place, at the principal place of business, or, where there is more than one such place, at the principal place of business, seems to us to give rise to difficulties. Firstly, where a firm has its headquarters in an Indian State, the provision will be of no value as the Act will not be in force in an Indian State. Secondly, no definition is possible of "the principal place of business," as this place must depend upon arrangement among the partners. We think, therefore, that it will be preferable to confine this clause merely to declaring the right of each partner to have access to all the books of the firm, and we have amended the clause accordingly.

Clause 14 (sec. 13).—As regards sub-clause (f), we consider that it will be improper to allow any partner to contract himself out of liability for fraud, and it is very doubtful if such a contract will be legal. As regards "wilful neglect," however, it should be open to a partner at least to limit his liability to indemnify his partners. We have accordingly deleted the words "fraud or" from this sub-clause and have inserted after clause 11 a new clause 11-A (sec. 10) relating to indemnification for fraud only. This new clause makes the liability to indemnify for fraud absolute and not subject to contract.

Clause 15 (sec. 14).—In the second paragraph we have substituted the word "acquired" for the word "purchased" in order to cover the acquisition of leases, mortgages, etc. We have also assimilated the wording in this paragraph to that in the first.

Clause 18 (sec. 17).—We propose, for greater clearness, to use for the phrase "change in a firm" the phrase "change in the constitution of a firm" throughout the Bill and we have amended the clause accordingly.

After the word "partners" we have also inserted the words "in the reconstituted firm" in order to make it clear that the clause has no reference to former partners. We propose to use the phrase "reconstituted firm" for the phrase "changed firm" throughout the Bill.

Clause 19 (secs. 18 and 19).—We have split sub-clause (1) into two separate provisions—clause 19 (sec. 18) and sub-clause 19-A (1) [sec. 19 (1)]. In clause 19, we have stated the general proposition that a partner is an agent of the firm, but have restricted this general proposition by prefacing the words "Subject to the provisions of this Act." We have also altered the word "affairs" into "business." The latter word is used in section 5 of the English Act and seems to be the more suitable term.

We have confined sub-clause 19-A (1) [sec. 19 (1)] to the statement of a partner's implied authority as agent of the firm.

As regards sub-clause (2) of clause 19 (now sub-clause (2) of clause 19-A) [sec. 19 (2)] it is clear from the opinions received that, in Calcutta particularly, it is a trade custom that partners make contracts of sale containing a clause referring disputes to arbitration. This sub-clause, as it stands, will make this practice impossible in the absence of



a contract between the partners; and it may also perhaps lay open to challenge the arbitration clauses in many existing contracts. It seems desirable, therefore, to relax the provisions of this sub-clause to some extent, and we propose to modify them by inserting at the beginning the words "In the absence of any usage or custom of trade to the contrary". These words are taken from section 1 of the Indian Contract Act. We also considered carefully the suggestion that the whole of this sub-clause should be deleted, but we are of opinion that in its modified form it will be a useful guide to many Courts.

We also consider that clause (f) should be widened so as to cover all acquisitions of immovable property.

Clause 22 (sec. 22).—We have omitted the second paragraph, as it contains no substance. Special laws relating to the execution and registration of documents, and to the drawing, accepting and endorsing of negotiable instruments will apply in any case without this proviso.

Clause 30 (sec. 30).—In sub-clause (2) we have made it explicit that a minor admitted to the benefits of partnership may be entitled to such share of the profits, as well as of the property, as may be agreed upon. Also, we consider it dangerous to give the minor, or any one acting for him, access to all the books of the firm, as some of the books may contain secrets which should be restricted to the partners. We have, therefore, altered the word "books" to "accounts."

We have made it quite clear in sub-clause (4) that the minor cannot sue for his share of the property or profits except when he wishes to sever his connexion with the firm.

We have deleted sub-clause (5), as we prefer to leave all arrangements relating to the minor's share of the property to be settled by agreement made when the minor is admitted to the benefits of partnership.

As regards the last sub-clause, there is a strong volume of opinion that the period within which the minor should give notice of his intention to leave the firm should be a definite period. In deference to this opinion we propose that that the period should be fixed at six months. As this is a considerable stretch of time in which many things may happen, we have deemed it expedient to work out in greater detail the rights and liabilities of the minor when he attains majority. We propose that he should be required to give public notice whether he elects to become or not to become a partner; and we have worked out the rights and liabilities on the general idea that this minority shall be deemed to continue until he gives notice, or until the expiry of the six months, as the case may be. We have done this in sub-clauses (6), (7) and (8) and have added sub-clause (9) to safeguard the interests of third parties in cases where the minor after attaining majority in fact acts as a partner before giving public notice.

Clause 31 (sec. 31).—In sub-clause (1) we have inserted a passage saving the provisions of clause 30.

We have amended sub-clause (2) to ensure that a new partner when entering a firm may voluntarily assume liability for acts done before he became a partner.

Clause 32 (sec. 32).—In sub-clause (2) we have added words explaining that the agreement can be implied only by a course of dealing after the third party has had notice of the retirement.

Clause 36 (sec. 36).—We have deleted the last nineteen words as the restriction they would place on the agreements contemplated seems to us to be undesirable.

Clause 37 (sec. 37).—We have deleted the reference to the Court as unnecessary.

Clauses 50 and 53 (secs. 50 and 53).—In both clauses we have inserted a proviso which will protect the rights of a partner who has bought the goodwill of the firm.

Clause 53-A (sec. 54).—This reproduces the second exception to section 27 of the Indian Contract Act, with amendments to assimilate it to clause 36 (2).

Clause 54 (sec. 55).—In sub-clause (2) we have made a small drafting amendment. In sub-clause (3) we have made the same amendment which we have made in clause 36 (2).

Clause 57 (sec. 58).—Under the original draft of sub-clause (1), the validity of the registration of a firm could be disputed on the ground that its principal place of business does not lie within the area in which it has been registered. To avoid this we propose that registration may be effected in any area in which the firm carries on business.

The small amendment in clause (e) will require partners to give their names in full.

At the end of sub-clause (1), we have inserted words which will allow partners residing at a distance to give special authority to agents to sign on their behalf applications for registration. This amendment will cover the signing of statements under clause 59 (sec. 60).

Clauses 60 and 61 (secs. 61 and 62) are similarly amended, but as regards these less important acts we have not required special authorization.

Clause 62 (sec. 63).—We have amended the clause in the same manner as clause 57 (sec. 58); and we have also made an amendment consequential on the amendment of clause 30.

Clause 67 (sec. 68).—The amendments in this clause are consequential on amendments in clauses 57, 60, 61 and 62 (secs. 58, 61, 62 and 63).

Clause 68 (sec. 69).—We have inserted the new sub-clause (4) to provide for the cases of firms whose places of business are all outside British India or in areas exempted from the operation of this Chapter. Such firms will be allowed to institute a suit, without being registered, in any Court in British India which otherwise has jurisdiction to try the suit.

Clause 70 (sec. 71).—As regards the fixing of fees payable to registering officers, we consider it most desirable that the fees should be uniform throughout India, and that they should not be allowed to be developed into a source of revenue disproportionate to the services rendered. We have, therefore, made a special sub-clause giving the power to make rules to fix fees to the Governor-General in Council, and we have framed a Schedule setting out the maximum rates which may be prescribed.

Clause 71 (sec. 72).—The first amendment is clause (a) is consequential upon the amendments in clause 30.

\* We have made an important change in this clause by requiring that all public notices shall be published in the Gazette and in a local vernacular newspaper. In addition, public notices relating to registered firms must also be communicated to the Registrar of Firms. In view of the wide area in which many firms in India operate, it seems to us to be insufficient that public notices relating to registered firms should be made merely by intimation to a Registrar of Firms.

4. We think that the Bill has not been so altered as to require republication, and we recommend that it be passed as now amended.

\*HAR BILAS SARDA.  
L. GRAHAM.  
L. V. HEATHCOTE.  
SATISH CH. SEN.  
S. C. MITRA.  
TRILOK NATH BHARGAVA.  
RAMESHWAR P. BAGLA.

The 23rd January, 1932.  
NEW DELHI,

### NOTE OF DISSENT.

While agreeing generally with the views set forth in the Report of the Select Committee, I find there are a few points on which I am unable to agree with the conclusions embodied in the Report.

2. The Indian Partnership Bill is based on the English Partnership Act of 1890 A.D. and, generally speaking, closely follows the provisions of the latter Act. As I am of opinion that trade and commerce in India have not always followed the same line of development as trade in England has done, and as conditions of life differ materially in certain respects in the two countries, I think that the means employed in England to achieve an object are not always suitable to be employed in India to achieve the same end. In view of this difference, I am apt to think that the provisions contained in Chapter VII of the Bill should be very cautiously and very gradually applied to India. The framers of the Bill, in enacting sub-clause (3) of clause 1, have recognised the difference between the business conditions in India and those in England by providing that clause 68 (sec. 69) of the Bill shall come into operation 12 months after the rest of the Bill comes into operation, in other words, after people in India have to some extent become familiar with the principles underlying the Bill.

3. Clause 68 (sec. 69) is not only the most vital clause in Chapter VII the most important Chapter in the Bill—but it introduces a provision on which serious difference of opinion exists.

4. I have no doubt whatever that from the point of view of Courts administering the law, and of the legal practitioners, enactment of clause 68 would be most useful inasmuch as some of the difficulties sometimes now experienced in order to prove the constitution of a particular firm, would be removed. But the matter has to be looked at also from the point of view of traders and businessmen. And looking at the matter from the point of view of men engaged in business on a small scale, the provisions of clause 68 (sec. 69) will prove a serious clog on business in small towns and villages. I am, therefore, of opinion that this clause should not apply to partnership firms doing business on a very restricted or small scale. While admitting that limitation of the application of clause 68 (sec. 69) in geographical terms may be invidious and a definition of small business in terms of capital employed in the business, not easy, I still think that the resources of language are not so inadequate as to fail to define with a certain degree of accuracy and exactness the limitation which we would place on the application of this clause. I would for instance, provide that this clause shall not apply to firms which can disclose the capital of the firm and that capital is below Rs. 1,000. This will bring within the purview of clause 68 (sec. 69) all firms which would not or cannot disclose their

\* Subject to a minute of dissent.

capital or which have a capital of Rs. 1,000 or more. A provision like this will not only fully serve the purpose for which clause 68 is sought to be enacted, but will afford relief from the clogging operation of this clause to small firms doing business in villages and smaller towns and whose operations do not admit of those firms being placed on the same plane of action as the big partnership firms operating in big cities on a large scale.

5. Another point on which I have to make an observation is with regard to the penalties provided in clause 69 (sec. 70). This clause places on the same footing "a false statement" and "an incomplete statement" and provides the same punishment for both. I am of opinion that if it be at all deemed necessary to provide in this Act a penalty for filing a false statement, I should have no objection. But I think that the penalty for filing an incomplete statement should not be more than a nominal fine, say, Rs. 50 or more, particularly in view of the fact that clause 58 (sec. 59) provides that the Registrar will record the particulars supplied, only when he is satisfied that they fulfil the provisions of clause 57 (sec. 58) which enumerates the particulars required by law to be filed.

6. Another point which I wish to emphasise is that the Indian Partnership Act is not a revenue measure and must not be so worked as to be made a source of revenue. Some expenses will have to be incurred to keep a staff to do the work of registration as provided in Chapter VII. Sufficient registration fees should therefore be levied to cover this extra expenditure. I therefore think that the schedule of fees (Schedule I) proposed to be levied under clause 70 (sec. 71) is rather high. I would alter Schedule I, so as to substitute Re. 1 for 3-0-0, and 0-8-0 for one rupee, wherever mentioned. The copying fee should be annas four for every page of the copy in place of annas four for every 100 words.

HAR BILAS SARDA.

The 24th January, 1932.

## APPENDIX X.

### ACCOUNTING AND BOOK-KEEPING.

#### **Capital, advances, profits, gross returns and losses :—**

The capital of a partnership must be distinguished from advances made by partners and from assets, and profits from gross profits. The capital is the total amount mutually agreed by the partners to be paid and risked for the purpose of carrying on the business. Advances, on the other hand, are not intended to be so risked and have a priority of payment in the event of dissolution. The capital is a fixed amount which cannot be withdrawn by a partner, added to or otherwise varied save by mutual consent. Assets, on the other hand, includes all property and interests in property originally brought into the stock of the firm, or acquired, by purchase or otherwise, by or for the firm or for the

purposes and in the course of the business of the firm. It is, therefore, of a variable nature and not fixed like capital. "Profits (or net profits) are the excess of returns over advances ; the excess of what is obtained over the cost of obtaining it. Losses, on the other hand, are the excess of advances over returns ; the excess of cost of obtaining over what is obtained. Profits and net profits are for all legal purposes synonymous expressions ; but the returns themselves are often called gross profits". (Lindley, p. 41). It is necessary to keep in view these distinctions for the purpose of accounting under section 48.

**Method of division of profits and losses :—**Appropriation of profit and loss to individual partners will be governed by agreement of parties but in the absence of any such agreement partners' shares of profits and losses are deemed to be equal.

• If the shares are equal, divide the amount of divisible profits or losses by the number of partners.

If the partners agree to share them according to some fixed ratio, e.g.,  $\frac{1}{2}$ ,  $\frac{1}{3}$ ,  $\frac{1}{6}$ , reduce the fractions to equivalent fractions having the lowest common denominator, divide the amount to be apportioned by that denominator and give to each partner the number of shares as represented by the numerators. Thus the equivalent fractions are  $\frac{2}{6}$ ,  $\frac{2}{6}$  and  $\frac{1}{6}$  and if Rs. 120 is to be divided in that ratio, divide 120 by 6 and multiply by 2, 2, and 1 by which method the amounts found are Rs. 40, Rs. 40 and Rs. 20.

If the shares are to be in proportion to their respective capitals, a partner's share is obtained by dividing the amount of total profit or loss by the total capital multiplied by the partner's individual capital. Thus if A, B and C contribute Rs. 200, Rs. 120 and Rs. 80 respectively and the profit is Rs. 500, their respective shares would be  $\frac{200}{400}$  multiplied by their individual capitals, i.e., the shares would be Rs. 250, Rs. 150 and Rs. 100 respectively.

**Partnership books :—**Generally books of partnership are divided into four groups: (i) Joint Capital Account, otherwise called Joint Stock Account, (ii) As many Private Ledger Accounts, otherwise called Separate Capital Accounts, as there are partners ; (iii) Periodical Balance Sheets, generally annual ; and (iv) Realisation of Assets Account.

It will be seen in the following accounts that, contrary to the legal conception of firm, where amounts would be paid to partners the firm is considered as a debtor to the whole amount and the partners as its creditors. In case of loss, the firm is the creditor and the partners are its debtors. Thus—

A contributes Rs. 200, B contributes Rs. 100 and C contributes Rs. 100.

### Joint Capital Account.

Dr.		Cr.
	A    Rs. 200	
	B    "    100	
	C    "    100	
	<u>Rs. 400</u>	
		By cash ... Rs. 400
		<u>Rs. 400</u>

### Separate Capital Accounts.

*A's account.*

Dr.		Cr.
		Rs. 200

*B's account.*

Dr.		Cr.
		Rs. 100

*C's account.*

Dr.		Cr.
		Rs. 100

Where A advances Rs. 50 and B draws Rs. 25.

### Joint Capital Account.

Dr.		Cr.
To A for capital	... Rs. 200	
for advance	... " 50	
" B for capital	... " 100	
" C for capital	... " 100	
	<u>Total ... Rs. 450</u>	
		By B's drawings ... Rs. 25
		" balance ... " 425
		<u>Total ... Rs. 450</u>

## Separate Capital Accounts.

A's account.

Dr.			Cr.
To balance ...	Rs. 250	By capital ...	Rs. 200
		„ advance ...	„ 50
	<u>Rs. 250</u>		<u>Rs. 250</u>

## Cash Account.

Dr.		Cr.
To balance ...	Rs. 100	By capital ...
	Rs. 100	

## Balance Sheet.

		Liabilities.		Assets.	
To balance ...	Rs. 100	A capital ...	Rs. 200	Cash	Rs. 425
		Add advance ...	" 50		
		B capital ...	" 100		
		C capital ...	" 100		
		Less drawings ...	" 25		
			Rs. 425		Rs. 425

B's account.

Dr.		Cr.	
To drawings	Rs. 25	By capital	Rs. 100
" balance	" 75		
	<hr/> Rs. 100		<hr/> Rs. 100

## First Annual Profit and Loss Account.

1st Case—Profit of Rs. 100.

Dr.			Cr.	
Purchases	...	Rs. 2,000	Sale of goods	Rs. 1,890
Rents, etc.	...	" 40	Stock	" 300
Rebatement	...	" 50		
charges	...	" 100		
Net profits	...			
		Rs. 2,190		Rs. 2,190

2ND Case—Loss of Rs. 100.

Dr.			Cr.	
Purchases	...	Rs. 2,000	Sale of goods	Rs. 1,890
Rents etc.	...	" 40	Stock	" 100
Establishment charges	...	" 50	Loss	" 100

## Balance Sheet.

[illegible]

**Joint Capital Account.**

[illegible]



# Separate Capital Accounts.

## A's account.

1st Case (Profit).		2nd Case (Loss).	
Dr.	Cr.	Dr.	Cr.
To balance ...	Rs. 303	To $\frac{1}{4}$ shares of loss ...	Rs. 200
		By capital ...	Rs. 50
		By advance ...	Rs. 203
		By interest ...	Rs. 53
			Rs. 253
	Rs. 303		Rs. 253

## B's account.

1st Case (Profit).		2nd Case (Loss).	
Dr.	Cr.	Dr.	Cr.
To drawings with interest ...	Rs. 100	To drawings with interest ...	Rs. 26-8
By capital ...	Rs. 100	By capital ...	Rs. 100
By $\frac{1}{4}$ share of profits ...	Rs. 25	By $\frac{1}{4}$ share of loss ...	Rs. 25-0
		By balance ...	Rs. 48-8
	Rs. 125		Rs. 100-0
	Rs. 125		Rs. 100

## C's account.

1st Case (Profit).		2nd Case (Loss).	
Dr.	Cr.	Dr.	Cr.
To balance ...	Rs. 125	To $\frac{1}{4}$ share of loss Rs. 25	Rs. 100
		By capital ...	Rs. 75
		By profits ...	Rs. 100
	Rs. 125		Rs. 100

**Realisation or Liquidation Account:**—This account is made in case of transfer of a business, admission of a new partner or dissolution and winding up of the business. The assets except cash as shown in the balance sheet at a money value do not generally fetch their face value at the time of realisation. Besides a certain cost is incurred for converting the assets into cash. Hence—

On the debit side the total value of the assets as shown in the last balance sheet and the cost of realisation are entered. Any liabilities which accrued due subsequently to the preparation of the last balance sheet must also be shown there.

On the credit side the cash realised on the sale of assets is entered.

The difference between the two represents the loss if the account shows a debit balance and profit if it shows a credit balance. The profit and loss are then transferred to the Separate Accounts of the partners, and the Realisation Account is balanced by entering the amount to be paid to and by the partners in the debit and credit sides respectively. It will be seen that the amounts to be contributed by partners on account of loss are included in the assets. When the capital contributed by partners are unequal but they agree to share profits and losses equally and there is a deficiency of capital, the deficiency is treated as a loss and is met like any other loss, and the assets should be distributed among the partners so as to put all on the same footing. In the case of an insolvent firm where all assets are exhausted and recourse to private property of partners is necessary for the purpose of meeting liabilities to third parties, and one of them is unable to bear his share of loss, his co-partners divide this as they would divide profits. This is not a question of division of assets but one of division of loss. But in the case of a solvent firm where outstanding liabilities to outsiders are met and there is still a surplus of assets to be divided among the partners and there is deficiency of capital, the question is one of division of assets in respect of the capital contributed by the partners and not of loss. Hence if in such cases one of the partners is unable to contribute his share of deficiency, the solvent partners are not bound to contribute for him but the available assets are distributed among the solvent partners in proportion to their capitals and not in the same proportion as they would divide loss. (See under sec. 48, *supra*, p. 176). The accounts would stand thus:—

**Realisation of Assets Account.**

Dr.					Cr.
To book value of assets as per last balance sheet ...	Rs. 526-8		By cash with int. ...	Rs. 27-0	
„ sundry creditors for liability accrued subsequently ...	„ 40-0		„ sundry debtors ...	„ 89-8	
„ expenses of realisation ...	„ 50-0		„ stock ...	„ 250-0	
			„ land ...	„ 60-0	
			Loss on realisation transferred to capital a/cs. of—		
			A ...	Rs. 95-0	
			B ...	„ 47-8	
			C ...	„ 47-8	
					„ 190-0
Total ...	Rs. 616-8		Total ...	Rs. 616-8	

*Separate account of A.*

Dr.		Cr.	
	Rs.		
To loss on realisation	95	By balance	303
To cash repayment	208		
	<u>Rs. 303</u>		<u>Rs. 303</u>

*Separate account of B.*

Dr.		Cr.	
	Rs.		Rs.
To loss on realisation	47-8	By balance	98-8
To cash re- payment	51-0		
	<u>Rs. 98-8</u>		<u>Rs. 98-8</u>

<i>Separate account of C.</i>			
<b>Dr.</b>		<b>Cr.</b>	
	Rs.		Rs.
To loss on realisation	47-8	By balance	125
To cash re- payment	77-8		
	<hr/>		<hr/>
	Rs. 125		Rs. 125

Cash Account.			
Dr.			Cr.
	Rs.		Rs.
To realisation of assets	426-8	Sundry creditors ...	40-0
		Expenses ...	50-0
		Repayments to	
		A ...	208-0
		B ...	51-0
		C ...	77-8
	Rs. 426-8		Rs. 426-8

**Where there is deficiency of Capital.***Balance Sheet.*

Liability.		Assets.	
Capital of		Sundry property ...	250
A) ... 200		Deficiency of B, ...	50
C. ... 100			
Rs. 300		Rs. 300	

*Realisation of assets.*

Dr.		Cr.	
To book value of assets	250	By cash	226
		By loss on realisation	
		A.	12
		B.	6
		C.	6
	<hr/> Rs. 250		<hr/> Rs. 250

<i>Liabilities.</i>			<i>Assets.</i>		
Capital of A.	...	Rs. 200	Cash	...	Rs. 226
Capital of C.	...	" 100	Loss on realisation		
			A, $\frac{1}{4}$ loss	... 12	
			C, $\frac{1}{4}$ loss	... 6	
				<hr/>	" 18
			Capital irrecoverable		
			from B.	... 50	
			$\frac{1}{4}$ loss on		
			realisation	6	
				<hr/>	" 56
		<hr/> Rs. 300			<hr/> Rs. 300

Now A has to pay Rs. 12, and B, Rs. 6, as their contribution towards loss on realisation and these amounts must be deducted from the amounts due to them. So A will get Rs. 150-10-8 and C, Rs. 75-5-4. Hence—

**Separate account of C.**

Dr.		Cr.		Dr.		Cr.	
	Rs.		Rs.		Rs.		Rs.
To loss on realisation ... 12-0-0		By share of available assets 162-10-8		To loss on realisation ... 6-0-0		By share of available assets 81-5-4	
To cash - 150-10-8				To cash 75-5-4			
<u>Rs. 162-10-8</u>		<u>Rs. 162-10-8</u>		<u>Rs. 81-5-4</u>		<u>Rs. 81-5-4</u>	

Dr.		Cr.	
To realisation ...	Rs. 226	By A. ...	Rs. 150-10-8
		„ G. ...	„ 75 -5-4
	<u>Rs. 226</u>		<u>Rs. 226-0-0</u>

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